L. J. Nicholas.

1958

DECISIONS

OF THE

SUPREME COURT AND VICE-ADMIRALTY COURT

OF

MAURITIUS.

DURING THE YEAR 1890

INDEX

EDITED BY

ARTHUR THIBAUD,—BARRISTER-AT-LAW

MAURITIUS:

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1891

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DECISIONS

OF THE

SUPREME COURT, VICE-ADMIRALTY COURT

AND

BANKRUPTCY COURT

OF

MAURITIUS

1890

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ARTHUR THIBAUD

BARRISTER-AT-LAW

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CENTRAL PRINTING ESTABLISHMENT, POUDRIÈRE STREET, No. 5.

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JUDGMENTS OF THE SUPREME AND OTHER COURTS

OF

MAURITIUS

EDITED BY

L. A. THIBAUD

BARRISTER-AT-LAW

1890

SUPREME COURT

APPEAL FROM DECISION OF THE MASTER—LICITATION—TITLE OF PETITIONER DOUBTFUL—STAY OF PROCEEDINGS — ARTICLE 101 OF ORDINANCE 19 OF 1868 — ITS MEANING—APPEAL DISMISSED—COSTS.

On a petition for the licitation of a plot of ground, one of the defendants produced evidence which rendered doubtful the title of the Petitioner.

The Master, thereupon, ordered a stay of the proceedings and granted three weeks to Petitioner in order that he should apply to the competent Court.

The Petitioner appealed from that order, on the ground, chiefly, that under Art. 101 of Ord. 16 of 1868, the Master should have allowed him to supplement his title by further evidence.

By the Court :

1o. *A party who applies for a licitation should have a clear title to the ownership of the subject which he wants to put up for sale, and this is a condition precedent.*

2o. *The true meaning of Art. 101 of Ord: 19 of 1868 is : that, upon objection raised, if the Master after looking into the titles, find that they do not give Petitioner a clear title, it is his duty to stay the proceedings in licitation.*

3o. *The legislator could not have intended to give to a party having either no title or a doubtful one, the right, upon a mere application for a licitation, to compel persons called as defendants to act, in reality, as plaintiffs in a procedure relative to a question of title.*

Appeal was dismissed ; but as the practice in such matters did not appear to have been clearly settled, without costs.

MAMET,—Appellant.

and

DUBOIS,—Respondent.

Before

His Honor Sir E. J. LECLÉZIO, KT.,—Chief Judge.

His Honor A. MURE,—Puisne Judge.

and

His Honor JOHN ROUILLARD,—Puisne Judge.

E. VAUDAGNE,—Counsel for Appellant.
A. ST. GEORGE,—Attorney for the same.

Hble. G. GUIBERT,—Counsel for Respondent.
Hble. H. LECLÉZIO,—Attorney for the same.

Record No. 24,995.

16*th. January* 1890.

This is an appeal from a decision given by the Master, on the 4th. November last, in an application for the sale by licitation of a plot of land situate of Flacq. The Master's judgment is as follows:

"Mamet, the party prosecuting the sale "by licitation of the property hereinbefore "mentioned, alleges that he is owner with "Dubois of the said property because of "the possession for more than thirty years "of the Civil partnership Dubois and Mamet.

"The evidence heard in this matter shows "that, rightly or wrongly, it is Dubois who "is in possession; that he has leased the land "in his name to the Beau Champ Sugar Es-"tates without any opposition from Mamet, "and that it is he, Dubois, who has always "received the rent of that plot of ground.

"Proceedings in licitation grounded on "an alleged possession like the one put for-"ward by Mamet seem to me to rest, as far "as he is concerned, on what may fairly be "called, a doubtful title, and in presence of "the facts proved by Mr. Dubois, I order a "stay of proceedings in this case and grant "three weeks to Mamet to move the com-"petent Court. The proceedings in licita-"tion are declared null and void if no step "is taken by Mamet during the three weeks, "Costs to abide the decision of the Court."

The appellant's grounds of appeal upon which the argument of Counsel principally rested were, that the judgment is contrary to the provisions of Ordinance No. 19 of 1868 and that in presence of the evidence produced, both documentary and oral, there was a strong prima facie case of ownership in favour of the appellant, and that the Master was wrong in not allowing him to supplement his title by further evidence, and to put him to the trouble of going to the Supreme Court for redress.

The Article of Ordinance No. 19 of 1868 upon which the appellant chiefly relies is Arricle 101 which runs as follows: "Within "thirty days after the expiry of the last "mentioned delay for notice, any defendant "in the licitation, or any inscribed or judg-"ment creditor may, if he thinks fit, object "to the licitation, or to any of the clauses or conditions of the Memorandum of charges or to any nulleties in the proceedings; such objection shall be made, heard and determined in like manner and subject to the same rules as herein before prescribed in Articles 85 and 86, the provisions of which articles are hereby extended and applied to the proceedings under the present chapter.

There is no doubt that the terms of this article appear to be very general and that, at first sight, there would seem to be no reason why, the Master having original jurisdiction in matters of sale by licitation, he should not have full powers to decide, in the first instance, all objections of whatever nature which might be made to the licitation prayed for. On the other hand, we

must not forget that the procedure of sale by licitation is one of summary nature and that it is to be presumed that a party who applies for a licitation has already a clear title to the co-ownership of the property which he wants to put up for sale. This is a condition precedent, and if the Master, upon objection raised and after looking into the titles of the petitioner, finds that they do not give him a clear right of co-ownership, it is the Master's duty to stay the proceedings in licitation ; if on the contrary, after examining the titles, the Master finds that the objection made to the licitation is not serious, he may order the proceedings of the sale to go on. Such, we believe, is the true meaning of article 101.

We cannot admit that the legislator intended to give to a party having either no title at all or a doubtful one, the right upon a mere application for a licitation, to compel persons, called as defendants, to act in reality as plaintiffs in a procedure relative to a question of title. The result of such an interpretation given to article 101 would be to allow parties the means of avoiding an action "en revendication" by filing a petition for a licitation. We do not think that when there is a serious issue of ownership raised by an objection to the licitation, it was intended to give the Master the right to decide it summarily by a procedure different from that usually followed for actions of this nature before the ordinary Courts. Formerly, when it was the Judge in Chambers who had the power to order the licitation the proceedings were stayed when a serious issue of ownership was raised, and a regular action "en revendication" was ordered to be entered ; we think that the same course should be followed under article 101 of Ordinance 19 of 1868.

It was argued that the Master had power to decide a question of ownership when the distraction of the whole or part of the property seized was applied for, but here we are in presence of a special text of the Ordinance (articles 63 and following), which gives the Master that power in matters of seizure ; that same power appears to have been extended to cases of distraction in matters of of licitation by a judgment of the Bail Court (Leconstant v. Vaudagne 1871 p. 92) but this decision cannot alter the principle now laid down, that a party who applies for a licitation must be presumed to have a clear title to the property before he can have recourse to the summary procedure of a sale by licitation.

In the present case, the appellant alleged that he was the co-owner of a certain land which, for the last seven years, appears to have been in the sole possession of the Respondent, who is the only party having leased it in 1886 to the Beau Champ Sugar Estate Company, after it was surveyed at his request. That particular land is not mentioned in the deeds of partnership with the Respondent which the Appellant produced as his titles to the land—Under such circumstances, the Master stayed the proceedings in licitation and ordered the Appellant to enter a regular action before the Competent Court in order to obtain a clear title to the land. We think that the Master interpreted rightly Article 101 of Ordinance 19 of 1868, and that finding the issue between the parties a serious issue of ownership, he acted wisely in ordering a stay of proceedings.

We must therefore dismiss the appeal, but we allow the appellant a new delay of three weeks from this day to enter a regular action before the competent Court.

With regard to the costs of his appeal, taking into consideration that the practice in such matters does not appear to have been clearly settled, we order that each party should pay his own costs.

SUPREME COURT.

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VALIDITY OF ATTACHMENT—CESSIO BONORUM OF DEBTOR—PROPERTY IN THE ASSIGNEES—CREDITORS ALL ON THE SAME FOOTING—ORD : 22 OF 1856—ARTS. 15 & 23—RIGHT OF PREFERENCE—VALIDITY REFUSED.

An attachment having been lodged against certain monies belonging to a debtor (a civil partnership) and the principal member of the partnership having made a "cessio bonorum," the assignees under the "cessio" objected to the validity of the attachment.

The Judge at Chambers referred the matter to the Court.

By the Court :

1o. The second, and only other partner, having abandoned all his rights in the concern, the whole property belonging to the civil partnership is now vested in the assignees under the "cessio bonorum".

2o. Under Ord. 22 of 1856, all the creditors of a person who have filed a petition for a cessio bonorum are placed on the same footing, unless one of them can claim a right of preference or privilege based upon our laws.

3o. Arts. 15 & 23 of Ord. No. 23 of 1856 show that a creditor lodging an attachment before the filing of a petition for a cessio by his debtor is not thereby entitled to a right of preference, and a validity cannot be ordered after the assignees have been appointed to represent in all things, *the mass of the creditors and to act for them and on their behalf.*

Validity prayed for, refused. The plaintiff was, however, allowed to add to his claim the costs made by him up to the date of the order of the Judge in Chambers staying the proceedings.

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PASCAU,—Plaintiff

and

DUCLERC DES RAUCHES,—Defendant

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Before

His Honor Sir E. J. LECLÉZIO, Kt.,—Chief Judge

and

His Honor A. MURE,—Puisne Judge.

—

V. KIVERN,—Counsel for Plaintiff.
E. HUTEAU,—Attorney for the same.

V. DELAFAYE,—Counsel for Defendant.
F. ROBERT,—Attorney for the same.

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Record No. 25024.

16th. *January* 1890.

This is a reference from chambers upon a demand in validity of an attachment lodged by the plaintiff in the hands of Langlois & Co., on the 30th. of August last, against all sums belonging to the Mon Loisir Aloe Fibre Establishment, the property of a Civil partnership working under the style of Duclerc des Rauches.

On the 11th September, the Defendant filed a petition for a cessio bonorum and his assignees have been substituted to him in the procedure of attachment.

The assignees object to the validity of the attachment, because, the Defendant having been allowed by the Judge in Bankruptcy to make a cessio bonorum, they say that all the creditors should be dealt with on an equal footing ; but the plaintiff insists upon the validity because he alleges that he alone having refused to sign an arrangement entered into in June 1888 between the Defendant and his creditors, he is the only creditor entitled to claim the sums which may be due by Langlois. It was, however, denied

that he was the only creditor having refused to sign that arrangement ; besides, we do not see how the arrangement of 1888, by which a delay was granted by certain creditors, under certain conditions relative to the carrying on of his business, to the Defendant for the payment of his debts, can affect the issue now raised. That arrangement has come to an end by the fact that the Defendant has filed a petition for a cessio bonorum and has been allowed to make it—and, besides, his right to the lease of Mon Loisir has been, sold by order of the Judge in Bankruptcy.

It was also argued that the Plaintiff is a creditor of the Civil partnership known under the style of Duclerc des Rauches and that the cessio was made by Duclerc des Rauches personally, but the other partner, Chateau, having abandoned all his rights to the assignees, the whole property belonging to the Civil partnership working under the style Duclerc des Rauches is now vested in the assignees.

With regard to the real issue between the parties, we think that the spirit of Ordinance No. 28 of 1856 is to place all the creditors of a person having filed a petition for a Cessio Bonorum on the same footing, unless one of them can claim a right of preference or privilege based upon our laws. Now, the mere fact of having lodged an attachment does not give a right of preference to a creditor. It is true that the Ordinances on Cessio Bonorum do not contain a special enactment, like the one contained in Article 50 of the Bankruptcy Ordinance of 1887, concerning attachments, but we think that there is enough in Articles 15 and 23 of Ordinance No. 23 of 1856 to show that a creditor lodging an attachment before the filing of a petition for a Cessio by his debtor, is not entitled thereby to a right of preference, and that a validity cannot be ordered after the assignees have been appointed to represent *in all things*, the mass of the creditors and to act for them and in their behalf—It would be creating a privilege which is not contemplated by and which would be contrary to the general spirit of our insolvency laws.

We must, therefore, refuse the validity prayed for, with costs. The plaintiff is however entitled to add to his claim, the costs made by him up to the date of the order of the judge in chambers by which the proceedings were stayed.

SUPREME COURT.

APPEAL FROM DECISION OF SEYCHELLES DISTRICT COURT—COMMUNAUTÉ D'ACQUETS—EMPLOI—LIQUIDATION—INTENTION OF WIFE—PROCEDURE.

A and B married together under the "regime de la communauté d'acquets" and a sum of Rs. 5,000 *forming the wife's marriage portion or "propre" was lost soon after.*

While her husband was away, the wife purchased, apparently with moneys her husband had inherited, two small immoveables in her own name.

The Court considered, upholding the decision of the District Court of Seychelles :

1o. *That the husband had not established, in answer to the wife's heirs, that the purchase of the two small properties constituted an emploi of the above Rs.* 5,000.

2o. *That the wife in purchasing the two properties had not expressed any intention of making an "emploi" of moneys to her belonging.*

The Court, further, expressed an opinion that the procedure followed in the Seychelles District Court by the heir (plaintiff) who, before a liquidation of the community had been effected, had asked payment of the portion accruing to him out of the Estate of his mother, was unusual and likely to give rise to future difficulties.

PILLIÉRON,—Appellant.

and

ROUILLON,—Respondent.

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Before

His Honor F. C. WILLIAMS,—Puisne Judge.

and

His Honor J. ROUILLARD,—Puisne Judge.

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J. JOLLIVET,—Counsel for Appellant.
N. DESJARDINS,—Attorney for the same.

V. K/VERN,—Counsel for Respondent.
A. DE COMARMOND,—Attorney for the same.

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Record No. 928.

11*th. March* 1890.

Mr. Pilliéron and his late wife, Augusta Savy, were married in the year 1857, under the "regime" of "communauté d'acquets," and, under that régime, a sum of $ 2,500 or Rs 5,000, which was the marriage portion of Mrs. Pilliéron, became a "propre" belonging to her.

The affairs of the community were far from prosperous. In some way or other, the sum of money which formed Mrs. Pilliéron's dowry was lost. Pilliéron and his wife migrated to Seychelles where Mrs. Pilliéron died in the year 1885, leaving seven children, some of them still minors.

The Plaintiff who was born in November 1864, married Mr. Rouillon in April 1886, one year after the death of her mother. In the year 1881, Pilliéron left Seychelles for France where he had inherited some property. During his absence, which lasted about two years, his wife drew bills of exchange on him for comparatively large sums and he also remitted sums of money to Mahé. — According to Pilliéron, whose evidence does not seem to be disputed on this point, the property inherited by him amounted to Rs 13,000.

During the absence of her husband, Mrs. Pelliéron, acting under a general power of attorney, which was apparently deemed sufficient by the parties interested, bought, in her own name, two small Estates, one of them situate at Anse Parnel and the other at Port Victoria, for a sum somewhat exceeding five thousand Rupees. In the deeds of sale, nothing is said as to the origin of the purchase money, or of the intention of Mrs. Pilliéron that the two properties should be held as an "emploi" of money forming her dowry (propre).

After the death of Mrs. Pilliéron in 1885, no settlement of the community between Pilliéron and his late wife was made, but in July 1888, the plaintiff introduced before the District Court of Seychelles a demand calling on her father to give an account of his guardianship. Pilliéron at once complied with the demand and filed an account to which several objections were made; but so, far as the Court can ascertain from the Record, the only questions which were submitted to the District Judge of Seychelles were:

1o. Whether the two immoveable properties above mentioned were purchased by the late Mrs. Pilliéron "à titre de remp'oi" or more properly "à titre d'emploi".

2o. Whether a sum of Rs 300 was really spent by appellant for the benefit of the Respondent.

On both points the learned Judge ruled in favour of the Respondent, and from his decision an appeal was made.

The Court cannot help remarking that the procedure followed in the District Court of Seychelles by plaintiff who, before a liquidation of the community between her late mother and father has been effected, asks of the latter payment of the portion which, as she supposes, accrues to her, out of the Estate of her mother, seems, to say the least, unusual. That it may give rise to

future difficulties is apparent, in as much as the main point raised in the present issue namely, whether certain immoveable properties are to be considered as " propres " of the late Mrs. Pilliéron or otherwise, will not be " res judicata " as to the other heirs.

Hence, the danger of different results in case other actions are brought, and the obvious necessity of a decision common to all. But, after due consideration, this Court has felt that it could not do otherwise than follow the parties on the ground chosen and accepted by them.

On the point whether the learned judge was right in rejecting an item of Rs. 300 for sums expended by the appellant for the use of respondent, we are clearly of opinion that the District Judge ruled in conformity with the evidence.

The point whether the two small Estates purchased by the late Mrs. Pilliéron unde the circumstances above related, are to be considered as " propres," is not free from difficulty.

We may remark that our task has not been simplified by the fact that oral evidence was introduced to prove not only the origin of the money with which the property was purchased, but also the circumstances on which the Defendant relied in order to prove that his wife intended to effect a " remploi" of her dowry " (propre) ",—although no nothing relative thereto was expressed in the deed of sale—But, after reviewing the evidence tendered, we agree with the learned judge that the defendant in the Court below has not made out his case. There was here, strictly speaking, no " emploi " of a "propre" which supposes that a specific sum of money belonging separately to Mrs. Pilliéron has been invested in the purchase of an immoveable property. Whatever money once belonged to Mrs. Pilliéron has been spent long ago. What is likely, is that Mrs. Pilliéron, having during the absence of her husband, the disposal of some funds, thought it prudent, by investing a few thousand Rupees in her own name, to place that sum out of the reach of her husband. There is no sign that Mrs. Pilliéron, who probably did not even know what a " propre " or a " remploi, " was in legal phraseology, ever meant to do more than, in a vague and a general way, to keep some property for her children, and she purchased some immoveable property in her own name as the best means of securing that object. At all events, if she meant to effect an " emploi " of a sum which, as she supposed, belonged to her, her intention ought to have been clearly expressed.

The Court therefore dismisses the appeal with costs.

SUPREME COURT.

ACTS OF ADULTERY—DATES—NOTICE OF FACTS—PLEA—AMENDMENT—PROOF OF ADULTERY OF MARRIED WOMAN, ART. 253, 254 PENAL CODE.

1o. *When in a notice of facts a plaintiff was taxed by a defendant with having committed discreditable acts, the Court considered that the dates of the alleged acts should be given.*

2o. *The plea did not distinctly maintain the truth of the alleged defamatory statements, but the notice of facts showed, however, that the intention of the defendant was to set up that defence, the Court allowed an amendment of the plea without costs.*

3o. *Although, under Arts.* 253 *and* 254 (*Penal Code*) *the husband is the only one entitled to prosecute his wife for adultery, yet, a party sued in damages for having charged a married woman with improper conduct, may prove the truth of such allegation if made "pro bono publico,"*

CANAL & WIFE,—Plaintiffs.

and

PHILIPPINI,—Defendant.

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Before

His Honor Sir E. J. LECLÉZIO, Kt.,—Chief Judge.

His Honor A. MURE,—Puisne Judge.

and

His Honor J. ROUILLARD,—Puisne Judge.

—

J. JOLLIVET,—Counsel for Plaintiffs.
A. ROHAN,—Attorney for the same.

Hon. W. NEWTON,—Counsel for Defendant.
H. THATCHER,—Attorney for the same.

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Record No. 24,641.

24th March 1890.

On Friday last, a point was taken by Mr. Jollivet on behalf of the plaintiff with regard to certain facts which the defendant wishes to prove. He objected to the proof of those facts, first, on the ground that the allegations made were too vague, and that the dates were not sufficiently specified. With regard to that first point, we have examined the notices of facts which were served by the Defendants, and we think that the fact No. 6 in the 2nd notice of facts, "That Mrs. Canal previous "to her marriage had intimate and improper "relations with one Jean Vial and Artus "Poupon" that the facts there alleged are not sufficiently precise, in order to allow the plaintiff to defend herself properly. The dates are not given and we are of opinion that we cannot allow the proof of the fact No. 6 as it is stated in that notice.

With regard to the other facts which are mentioned in the notices, we think that the dates having been given in the third notice of facts, which was served after the parties had been before the Judge in Chambers, that those dates are sufficient and that therefore it is not necessary to precise more than the defendant has done.

The months are given in which those facts are alleged to have taken place and as there is a continuity of conduct alleged on the part of the plaintiff, we think that those facts are sufficiently precise.

The second point is that the defendant wishes to prove the truth of the defamation which is complained of by the plaintiff and that nowhere in his plea does he aver the truth of this defamation; that there is no proper plea of justification.

We have read with care the pleas of the Defendant and we think that they do not sufficiently raise the issue of the truth of the alleged defamation. But, however, the plaintiffs knew well from the facts which are contained in the notices of facts that were served upon them, that the intention of the defendant here was to prove the truth of the allegations which were complained of, and, therefore, it becomes purely and simply a matter of form, in our opinion, that a more precise plea should be filed. We order that plea to be filed in order that the pleadings should be more regular and complete before the Court; but we do not fix any conditions except with regard to the time of the filing of the plea. We think that the time should be as short as possible, on account of the time which the case has already taken, and we will grant 24 hours to the Defendant to file a plea averring the truth of the allegations that are complained of by the plaintiff.

The third point that was taken was that according to the Penal Code Arts. 253 & 254 the defendant had no right to bring before the Court facts concerning the adultery of one of the plaintiffs, that the husband was the only person who could in law complain of the conduct of the wife and ask that she be punished, and, as a consequence of that enactment of the Penal Code, that a defen-

dant in a case of defamation had no right to ask to prove the truth of the defamation complained of when that defamation is the alleged adultery of the wife. We think that this theory based upon one of the enactments of the Penal Code cannot be sustained in a case like the present one. There is no doubt that the wife cannot be prosecuted and punished for adultery except at the request and with the consent of her husband—but, at the same time, when a married woman fulfilled public functions, as for instance, in the present case, those of a school mistress, and when the alleged defamation is her improper conduct, giving rise to scandal in the locality where she occupies a public position of trust and when the defendant is sued for having said that the woman was of a bad conduct and he wants to prove the truth of the allegations in view of his defence, which is that what he said was said by him *pro bono publico*—we think that the articles of the Penal Code which were mentioned by the plaintiff's counsel cannot prevent the defendant from proving the truth of the allegations, as it may result from the evidence that it was for the public benefit that he denounced the conduct of the plaintiffs. We must, therefore, set aside the third point taken by the plaintiffs' counsel here and hold that in the present case, the defendant is entitled to prove the truth of his allegations.

SUPREME COURT

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VALIDITY OF ATTACHMENT—FIDUCIARY CHARACTER—ABSENCE OF PROOF.

Upon the attachment of certain monies belonging to A, who had sued as plaintiff and whose case had been struck out, A pleaded that he had acted only in a fiduciary character and was not, therefore, personally liable.

The Court, considering that A had appeared as plaintiff and had made his alleged principals defendants in the main action, in the absence of clear proof of his alleged fiduciary position, validated the attachment with costs.

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HUTEAU,—Plaintiff

and

MARTIN,—Defendant

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Before

His Honor A. MURE,—Puisne Judge.

and

His Honor J. ROUILLARD,—Puisne Judge.

—

V. K[VERN,—Counsel for Plaintiff.
E. HUTEAU,—Attorney for the same.

H. GALÉA,—Counsel for Defendant.
E. SAUZIER,—Attorney for the same.

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Record No. 25,106.

28*th March* 1896.

This is an application by Mr. Attorney Huteau for the validity of an attachment which has been referred to us from Chambers. The validation is objected to on the ground that the Plaintiffs in the original action occupied a fiduciary position and stood in the position of trustees. We have carefully read the papers which were submitted to us, and we see that the matter arose in a somewhat peculiar way, because the case was not determined by the Court but was simply struck out with costs, against the plaintiff; that is to say, there was no determination by the Court of the merits of the case but merely at the request of the plaintiffs themselves, the case was struck out. Upon considering the papers, we find that undoubtedly there were certain allega-

tions which lead to the supposition that Mr. Martin, the respondent, here was litigating for others as well as for himself. But we have not this "accord" of the distillers before us, we have no proof of its existence, we have no document showing that it existed, and we have no proof that the plaintiffs in this action came into Court empowered to act as trustees by the body of the distillers. On the contrary, it seems as if they had acted beyond their powers, because if they had appeared in virtue of the authority given to them by a deed to vindicate the rights of the body of distillers, it would have been necessary for them simply to raise an action by themselves. But what is done here is that three persons appear as individuals in the designation, and there every one of the alleged parties to the "accord" are called as defendants in addition to the principal defendant who is a Mrs. Bouffé.

That is very clearly a case in which the parties, as it seems to me, were acting as individuals and ought to be treated as individuals.

The judgment goes out against them as individuals and, when it is going to be executed against them as individuals, the respondents object and object for the first time that they have stood in a fiduciary position. We do not think that that ought to be sustained by this Court because the party appeared as an individual before the Court and in that capacity the judgment went out against him, and that if we validate this attachment and reserve the right of Mr. Martin to go against the "caisse", which he says, has plenty of money to meet the costs, if we do that, we go as far as we ought to go and that is the judgment of the Court.

Costs in favour of the applicant.

SUPREME COURT

APPEAL FROM DECISION OF DISTRICT COURT — COMPENSATION OR SET OFF — OBLIGATION SOLIDAIRE AND CONTRIBUTION — ARTICLE 1298 C. C. — MONEY ATTACHED — APPEAL DISMISSED.

A District Court decided that a certain sum belonging to a job-contractor and attached in the hands of a sugar estate owner, should be divided among the creditors of the job-contractor in the proportion of their claims.

The Sugar Estate owner appealed on the ground that being, at the same time, creditor and debtor of the job-contractor, his debt to the job-contractor had been extinguished by set off.

By the Court:

1o. *A set off can take place in the case of a joint and several obligation like the one of a Sugar Estate owner and a job-contractor before a Stipendiary Magistrate for the wages, rations and medical attendance of of the labours engaged to the job-contractor.*

2o. *But, in this case, the Sugar Estate owner did not provide the wages, rations &c. directly to the parties concerned. What he did was to request the agent of his Estate to pay the merchants who had supplied the necessary goods to the job-contractor.*

3o. *Under the circumstances, these payments were merely in the nature of an advance or loan of money to the job-contractor.*

4o. *The right of set off must be denied and the sugar estate owner must share in the distribution of the sum attached in his hands as the other creditors.*

Appealed dismissed with costs.

The Court did not decide the point whether a plea of set off can be urged for the first time before the Court of appeal.

D'ARIFAT AND WIFE AND ORS,—
Appellants.

and

GOKOOL SALLECK AND ORS,—
Respondents.

—

Before

His Honor A. MURE,—Puisne Judge.

and

His Honor J. ROUILLARD,—Puisne Judge.

—

Hble. W. NEWTON,—Counsel for Appellants.
Hble. H. LECLEZIO,—Attorney for the same.

H. GALEA,—Counsel for the Respondents.
D. CHAPERON,—Attorney for the same.

Record No. 940.

28*th. March* 1890.

JUDGMENT.

Delivered by His Honor Mr. Justice A. MURE.

This is an appeal from a judgment of the District Magistrate of Moka in a case which had arisen between the owners of Valetta Estate and Gokool Salleck. Gokool Salleck had obtained judgment against one D'Argent and in virtue of that judgment had attached in the hands of the owners of Valetta all the sums of money due on any account to the Defendant Nemours D'Argent, especially the indemnity which the said owners would have to pay to D'Argent in case they should elect to keep on their property the huts built by D'Argent on lands belonging to them. When this attachment was served on Messrs. D'Arifat, the owners of Valetta, the usher, in his return, relates that the answer was that the huts already belonged to them and that they had no indemnity to pay. The question of this opposition having come up in Court, a day was fixed by the Magistrate for the consideration of the case—Mr. D'Arifat attended and became a party to the case and gave evidence which amounts to, what is called in this Court, an affirmative declaration, but, it is evidence in the case embracing many things beyond what would have taken place in a mere affirmative declaration, and affecting the questions which had arisen between the owners of Valetta Estate, whom be represented, and Gokool Salleck—The Magistrate, after hearing a great deal of evidence, found that the owners of Valetta owed D'Argent a total sum of Rs. 6,993.21c.; of which there was due for 90 huts, at Rs. 15 a hut, Rs. 1,350, while the balance consisted of work done on the Estate by D'Argent; while, on the other hand, D'Argent was indebted to the garnishees, the owners of Valetta, and owed them no less a sum than Rs. 10,229,06c.—and the Magistrate simply directed that that sum should be divided between the plaintiffs and the garnishees in proportion of their respective claims.

The case came on appeal to this Court and, here, it was pleaded by the appellant that D'Argent was a job-contractor on the estate Valetta, that prior to that job-contractor being allowed to work on the estate Valetta, he was bound to enter into a contract with the owners of Valetta under which the latter became guarantees of the wages, rations and the medical attendance which were due to the workmen of D'Argent. That depended on certain provisions of the Labor Ordinance, No. 12 of 1878, under the 235th section of which it is enacted, that "Every Stipendiary Magistrate "before passing a contract of service be- "tween any job-contractor and an immi- "grant from India for employment in agri- "cultural labor may and shall require the "wages, rations, lodgings, and medical care "of such immigrant to be guaranteed in the "manner prescribed in this Ordinance, and "such Magistrate shall refuse to pass such "contract of service without such guarantee." And then, in the next clause of the Ordinance, it is enacted that the guarantee "shall

" be by way of a joint and several obligation " on the part of such owner" &c., along " with the job-contractor for payment of the " wages, rations, lodgings, and medical care " of the said servant, during such time " as he shall be employed."

And it is important to observe that there is a schedule referred to in these clauses of the Ordinance which says : " Whereas cer- " tain immigrants from India whose names " are appended hereto, have entered into a " contract of service as agricultural laborers " for a period of—— months with ——— " job-contractor, residing at ———and so " on."

It is quite apparent therefore that the immigrants whose names are appended to the bond which has to be entered into are the creditors on that bond.

It appears from the evidence we have here that the procedure which took place between D'Arifat and D'Argent was something like the following :—that D'Argent incurred considerable expenses for grain and other food for the labourers, and, being unable to pay his accounts, they were guaranteed to be paid by the agent of the estate in town, and they were paid by him but many months after D'Argent had disappeared.

We have considered what is the position of this matter under Article 1298 of the Civil Code. If any right is acquired by a third party, then the operation of compensation is put an end to and the article of the Code specially refers to an attachment as the ordinary form in which the right of the third party may be acquired. Certain commentators have introduced an exception to this rule; they have said that if there be a certain course of dealing between two parties and there is a previous agreement between them that the debit and credit of the two parties shall be compensated, that that is an exception to Article 1298 ; and, in like manner, they refer to the case of a woman who has been separated from her husband as to goods and who is the debtor of the husband but has a right of recourse against him for the debts which previously to the separation of goods they owed in solido. That, it is said, is an exception to the rule, and we agree with the argument so far of the learned gentleman who appeared for Messrs. D'Arifat, that the case of a previous obligation is even a stronger point than the case of a previous agreement and that the doctrine so laid down by those commentators and in one case supported by a judgment in Cassation, is and ought to be applied to the case of a joint and several obligation undertaken by a job contractor and the owner of a Sugar Estate. While agreeing to this so far, we have carefully looked into the manner in which these debts, which D'Argent came to owe towards the 'Valetta' owners, were incurred, and we find that in place of the "Valetta" owners paying the rations and wages and providing the medical attendance directly to the parties concerned, it was done in the way I have indicated, by a request from the owners of "Valetta" to the agent of the Estate to pay the Merchants and other parties who had supplied goods to D'Argent—in short that it was merely by an advance and a loan of money made to D'Argent. Even the medical attendance, which, I expected to find, would be a direct claim at the instance of the owners of Valetta, even that is made out in the name of D'Argent, the job contractor, so that it must also be considered merely as a loan of money by the owners of " Valetta" to the job contractor.

Now, if we were to hold that procedure of that kind was a fulfilment of the obligation under the clause of the Labour Law to which I have referred, I fear that our judgment would go much further than we contemplate at this moment in this action. Suppose that a bill had been guaranteed and endorsed by Messrs. D'Arifat—that would be in the same position as the claim which exists in the present action. We are unable to

hold therefore that the procedure adopted by the Messrs. D'Arifat is sufficient to bring the matter within the purview of the clause of the Labor Law. The payment should have been made directly to D'Argent's men, the rations should have been given by the owners of Valetta, direct; and evidence of the mode of payment and that mode of fulfilling the obligation should exist in order to create the obligation and in order to create the right under the job contractor's bond, because the Indians whose names are appended to the Bond, are the creditors on the Bond, and the joint guarantors are bound to give them directly what the other obligants in the Bond have failed to do. But we have not found that that course was followed. And, therefore, we cannot sustain in favor of Messrs. D'Arifat, the argument which was so ably laid before us, though in principle we adopt it. There remains merely to notice the trifling matter connected with the supposed affirmative declaration. Mr. D'Arifat appeared as a party to the case; he became a witness not merely about the matter of the sums that were due by the Estate to Nemours D'Argent, but his evidence invoked matters connected with the case, in short he became a party to the case and, therefore, we do not think there is any distinction that could be made between the expenses to which he would be entitled if he had made an affirmative declaration and those which he has incurred as a party and a witness.

We, therefore, refuse the appeal, and affirm the judgment of the Magistrate with costs against the appellant.

JUDGMENT.

Delivered by His Honor Mr. Justice J. ROUILLARD.

I agree with my learned brother, that the judgment of the magistrate should be supported, and that in this case, under the circumstances which have been disclosed, there cannot be any set off. My observations will not bear upon that point but on another point which was urged by Mr. Newton. In the Court below, it seems that the plea of set off was not raised and this important question come to be discussed for the first time on appeal before this Court. To this mode of proceeding, the respondent objected and thus, one of the points before this Court was whether it is possible to discuss in a superior Court a question, especially a mode of defence, which was not raised in the Court below.

It has been unnecessary to decide this point because, on the main question, my my colleague and myself are in perfect agreement. I wish however, on the preliminary point, to reserve my opinion for the future. This question will surely arise some day or other on appeal before this Court, and it might be contended that because we entertained the main question raised on the present appeal, we supported the appellant's argument on the first point.

SUPREME COURT.

JUDICIAL SEPARATION — ALIMONY — COSTS OF LITIGATION — HUSBAND'S LIABILITY — WIFE'S RESIDENCE — MEANING OF JUDGE'S ORDER — COSTS.

The Respondent to an action for a judicial separation resisted an application by his wife for an alimony, on the ground, chiefly, that she had not taken up her residence at her father's house, as ordered by the Judge at Chambers.

Held, that the true meaning of the order was that the wife should reside with her father, under his care and guardianship, and not on the premises occupied by the father at the time of the order and which he had left since.

Held also that the husband was bound to provide the wife with the means of carrying on her litigation, a state of affairs having arisen in the conjugal relations as required the judgment of a Court of law to settle.

—

CAPTIEUX THE WIFE,—Plaintiff.

and

CAPTIEUX THE HUSBAND,—Defendant.

—

Before

His Honor A. MURE,—Puisne Judge

and

His E. DIDIER ST. AMAND,—Puisne Judge.

—

E. KOENIG,—Counsel for the Plaintiff.
G. ROCHERY,—Attorney for the same.

J. JOULIVET,—Counsel for the Defendant.
V. DUCASSE,—Attorney for the same.

—

Record No. 25101.

2*nd April* 1890.

This is an application by a wife made pending an action for separation of the body, in which she asks a monthly sum of alimony of Rs 60, and further a sum of Rs 400 to bear the costs of the action.

The application was resisted chiefly on the ground that the wife had not taken up her residence nor continued to reside in the house ordered by the Judge. The Plaintiff was ordered to reside at her father's house, which, it appears, was at one time at Mahebourg, but before the date of the order was changed to Port Louis, where the applicant lives with her father. We consider that when she applied to live with her father and the Judge ordered her to do so, the intention was to live at Port Louis and not at Mahebourg, and that the applicant has fulfilled the order of the Judge and not violated the 269th article of the Code Civil. She is living under the care and guardianship of her father. We are unable to sustain the objection to the application on this ground.

It seems that of the children born of the marriage between the parties, three of them, being the youngest, are living with their mother. Two of these being of very tender years, we hold, are properly with the applicant, as they must require a mother's care and attention. The third of these, who is seven years of age, ought to be with the Respondent, the father, and in estimating the alimony we cannot reckon as for this child.

The Respondent is a driver on the Railway and is paid at the rate of Rs 160 per month, and lives in a house belonging to himself, which has been restored and increased in size during the subsistence of the marriage, and the estimated rent of which must be taken into account in considering his income, and he is also proprietor of a small house which yields Rs. 72 of rent per annum. Altogether, the income of the Respondent amounts to somewhat more than Rs. 2,000 per annum.

The obligation of the Respondent to support the applicant, his wife, and the two children, whom the Court think to be properly with the mother, is undoubted. It is equally clear that under the decisions of the French Courts and in conformity with the opinion of the best commentators, the husband is bound to provide the wife with the means of carrying on her litigation, such a state of matters having arisen in the conjugal relations, as requires the judgment of a Court of Law to settle. We think we deal gently with the Respondent, when we order him to pay alimony to the applicant at the rate of Rs. 40 per mensem, from the date of her leaving the Respondent's house up to the date of the decision in the action of separation now pending between them; and we further order the Respondent to pay to the applicant Rs. 200 in name of costs of suit.

Costs of this application to the applicant.

SUPREME COURT.

—

APPEAL — VERBAL LEASE — ORAL EVIDENCE — ARTICLES 1341 AND 1715 C. C. — ORDRE PUBLIC — DELAY — RIGHTS OF LESSEE — DAMAGES — DECISION MODIFIED — COSTS.

1o. *In the matter of proof of a verbal lease, when there is consent given to parol evidence, the party who has so consented cannot afterwards appeal from the judgement on the ground that the Court of first instance ought to have disallowed the parol evidence, because the enactments of articles 1341 and 1715 C. C. must be considered as being "d'ordre public."*

2o. *A delay of a few days on the part of a lessee in occupying the premises is not sufficient by itself to annul a contract of lease.*

3o. *When there is only a verbal lease by the month, which can be put an end to almost immediately by a notice to quit, the lessee is not entitled to a delivery of the premises, but merely to a certain sum for damages.*

The Court modified, accordingly, the decision of the District Court appealed from.

—

WIDOW SALAFFA,—Appellant

and

DESBLEDS,—Respondent.

—

Before

His Honor Sir E. J. LECLÉZIO, KT.,—
Chief Judge.

and

His Honor J. ROUILLARD, — Puisne Judge.

—

Hon. W: NEWTON,—Counsel for Appellant,
H. BERTIN,—Attorney for the same.

A. GALEA,—Counsel for Respondent,
W. LE BLANC,—Attorney for the same.

—

Record No. 936.

9th. April 1890.

This is an appeal from a decision of the District Magistrate of Plaines Wilhems by which the Magistrate condemned the appellant, who was the Defendant in the Court below, to pay a sum of Rs. 500 as damages to Mr. Desbleds, who was Plaintiff, for breach of a contract of lease, and by which he also ordered that the premises should be forthwith delivered to the Plaintiff.

The first point which was taken on appeal before the Court was that the Magistrate was wrong in having allowed parol evidence in this case in order to prove the contract of lease, because the provisions of the Civil Code concerning parol evidence, Art 1341 and 1715, are provisions affecting public order, and that, although the Defendant consented to that mode of evidence, yet, on acount of its character, the Magistrate ought not to have allowed it.

The point appears to be a rather vexed one in France. There are many commentators in favor of the theory that the provisions of the Civil Code are "d'ordre public" and there are as many who are against that theory.

After having carefully examined all the opinions on this point, we have come to the conclusion that we should rather adopt the opinion of the commentators and of certain Courts of Justice who have held that when there is consent given to parol evidence the party who has so consented cannot afterwards appeal from the judgment, on the ground that the Court of first Instance ought to have disallowed the parol evidence on account of the character which was attributed to it.

In Dalloz, Ver. Obligations, No. 4615 and in the preceding numbers, the whole question is well reviewed, and, in his summing up on that point, Dalloz says :— "On ne "voit donc pas de raison sérieuse pour sou-

" tenir que l'ordre public est intéressé à la " prohibition lorsque le consentement des " parties intervient; il y a là d'ailleurs une " sorte de contrat judiciaire très licite en " soi. "—

We think that this opinion should be followed by this Court. There are several *arrêts* quoted by Dalloz in which it is shown that when there has been consent given, there is no appeal possible afterwards on that point. Here, there is no doubt that the Defendant who, it appears from the record, was represented by her son, a gentleman who had made legal studies in France, did give formal consent to parol evidence, and we must therefore reject the first point on appeal.

The 2nd. question which was argued before us was that there had been a conditional lease made; that is to say, that there had been a guarantee stipulated by the Defendant, and that, the Plaintiff having been unable to give that guarantee to the Defendant, the lessor, the contract of lease was null, and that the lessor had the right to consider it as such. It was also argued that the lessee having delayed to take possession of the premises, the lessor was entitled to refuse the keys when they were asked for There is no doubt, in first place, that there was a verbal contract of lease by the month between the parties. The exact date at which the lessee was to begin the occupation of the premises is not very clear from the evidence; but, however, we are of opinion that whether it was on the 25th. October or on the 1st November, the delay in the occupation is not sufficient by itself to annul the contract of lease; and with regard to the question of guarantee we think that the evidence on the part of the Defendant is unsatisfactory. It is not clearly stated what sort of guarantee was to be given. It was said that the guarantee was that the premises should be stocked with goods representing a certain amount of rent, or that a guarantee should be given for a certain amount of rent. Now, the deposit of goods could only be made if the premises had been handed over to the lessee, he could not send goods to the premises before he had the keys and before he could occupy the premises; and the alternative alluded to appears to us to be rather vague. We are therefore of opinion that the judgment of the Magistrate on that point is good; that the lessor had no right to set aside the contract of lease, which is not denied, either on the ground that there was delay in the occupation or on the ground of the alleged guarantee.

The third point taken was as to the amount of damages. The Magistrate has awarded Rs 500 as damages.—We find those damages really excessive in presence of the facts of the case. The lease, after all, was for a very small sum per month. The premises were not large premises, and the Respondent who was the Plaintiff in the Court below, has not shown that he had at his disposal, at the time when the lease was to begin, whether it was on the 25th October or on the 1st November, a large amount of goods. In fact, the evidence with regard to the goods that might have been at his disposal at that time showed that there was really a very trifling amount of goods which could be placed on the premises. We think, therefore, that by reducing the damages to the sum of Rs 50 that will be a reasonable sum for the loss which the Respondent may have suffered. There is another part of the judgment of the Magistrate which we think should be set aside completely, it is that part of the judgment in which he orders the premises to be handed over to the lessee. Now, in a case of this nature, where there was a verbal lease by the month which could be put an end to almost immediately by a notice to quit, we think that the Respondent was not entitled to obtain the delivery of the premises. What the lessee is entitled to, under such circumstances, is mearly a certain sum for damages. We shall

SUPREME COURT OF MAURITIUS

His Honor Sir E. J. LECLÉZIO, Chief Judge.

His Honor A. MURE, Puisne Judge.

His Honor FRÉDÉRIC CONDÉ WILLIAMS, Puisne Judge.

His Honor JOHN ROUILLARD, Puisne Judge.

The Honorable LIONEL COX, Procureur and Advocate General.

L. A. THIBAUD, Acting Substitute Procureur General.

E. DIDIER ST. AMAND, Master.
C. D'EMMEREZ DE CHARMOY, Esq., Registrar.

L. ISNARD, Chief Clerk and Assistant Taxing Officer.

VICE-ADMIRALTY COURT

His Honor Sir E. J. LECLÉZIO, Chief Justice, Judge.

The Honorable A. MURE, Judge Surrogate.

The Honoroble LIONEL COX, Queen's Advocate.

G. RITTER, Registrar.

J. J. BROWN, Marshall.

J. GUIBERT, Queen's Proctor.

COURT OF BANKRUPTCY

JUDGE:—THE MASTER OF THE SUPREME COURT.

GEO. NEWTON, Accountant in Bankruptcy.

H. B. DOWSON, Registrar of the Court of Bankruptcy.

COUNSEL (actually practising)

Leclézio, E.	1828	Lionnet, E.	1870	Kœnig, E.	1884
Bazire, E.	1858	Desenne, O.	1871	Noël, M.	1885
Martin Moncamp, P. G.,	1861	I. Jollivet	1873	Serret, E.	1887
Delafaye, V.	1864	Mathews, F.	1876	Herchenroder,	1888
Chastellier, P. L.	1864	Hewetson, H.	1876	Leclézio, L	1888
Guibert, G.	1864	Hugues, A.	1877	Vaudagne, E	1888
Newton, W.	1864	Colin, R.	1878		
Lepoigneur, I.	1864	K/Vern, V.	1880		
Galéa, H.	1867	Laurent, O.	1883		
Beaugeard, P.	1868	Jenkins, D.	1884		

ATTORNIES (actually practising)

Lalandelle, G.	1842	Halais, J.	1865	Ducasse, V.	1879
Hewetson, W.	1846	Sauzier, E.	1866	Leclézio, H.	1880
Laurent, E.	1846	Commarmond, A.	1867	Edwards, W. H.	1881
Mercier, J.	1848	Rousset. C.	1870	Colin, E.	1882
Colin, A. J.	1851	Wohrnitz, L.	1870	Huteau, E.	1882
Guibert, J.	1853	Rolando, A.	1871	Leblanc, M.	1884
Finniss, W.	1853	St. Pern, L. de	1871	Marjolin, V.	1884
Duvivier, Ed.	1854	Ganachaud, E.	1871	Chaperon, D. O.	1885
Chazal, P. E. de	1860	Lastelle, F.	1872	Bernard	1887
Victor F.	1861	Leblanc, W.	1872	Piarroux, S	1887
Mallet, F.	1861	Arnal, C.	1873	Robert, F. (junior)	1887
Ducray, V. G.	1861	Kœnig, G.	1874		
Sicard, N.	1862	Bouloux, G.	1876		
Simonet, F.	1863	Thatcher, H.	1876		
Pitot, A	1863	L'hoste, A.	1877		
Bétuel, V.	1863	Leblanc, E.	1877		
Boullé, A.	1863	Herchenroder, G.	1877		
ter, G. A.	1864	Lafitte, L.	1878		
han, A.	1864	Chaillet, E.	1878		

DECISIONS

OF THE

SUPREME COURT, VICE-ADMIRALTY COURT

AND

BANKRUPTCY COURT

OF

MAURITIUS

1890

PART II

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EDITED BY

ARTHUR THIBAUD

BARRISTER-AT-LAW

MAURITIUS:

CENTRAL PRINTING ESTABLISHMENT, POUDRIÈRE STREET, No. 5.

1891

therefore set aside that part of the judgment of the Magistrate in which he orders the delivery of the premises to the Respondent.

After having modified the Magistrate's judgment to that extent, we think that each party should pay his own costs upon the appeal.

SUPREME COURT.

CONVICTION— APPEAL— LARCENY— WIFE— HUSBAND'S PROPERTY— ART. 302 P. C. — KNOWLEDGE IN THE WIFE— MANDATORY— SERVANT—ECCEPTIONAL ENACTMENT— DUTY OF ACCUSED—COSTS.

1o. *When a husband is not a regular and permanent mandatory, but merely a servant bound to deliver over the balance of the actual monies which he has received, whenever called upon to do so, the wife who takes away part of that money, knowing that it is not the property of her husband, can be found guilty of larceny.*

2o. *When an accused founds on an exceptional enactment of the law in his favour, he ought to bring out all the facts and circumstances which raise this plea in defence to the charge.*

The Court dismissed, with costs, the appeal from the conviction by a District Court.

BONORCHIS,—Appellant.

and

QUEEN,—Respondent.

Before

His Honor ANDREW MURE,—Puisne Judge.

and

His Honor E. DIDIER ST. AMAND,—Puisne Judge.

P. JENKINS,—Counsel for the appellant.
G. BOULLOUX,—Attorney for the same.

L. A. THIBAUD, Actg. Subs. Proc. General,—Appears for the Respondent.

J. GUIBERT, "Crown Attorney,"—Attorney for the same.

Record No. 565.

16th. April 1890.

The appellant Cecile Vallet is the wife of one Albert Bonorchis, who was employed on the Estate of Benarès, and part of whose duty it was to take charge of the wharf store belonging to Ange Constantin, at Souillac, and to receive the freight-money for goods carried by his boat.

On the 31st. December last, the appellant went from her house to the wharf to complain of her husband's conduct in leaving her without food. Just before that moment, Bonorchis had taken out of the desk, in Mr. Constantin's office, a roll of notes, having some matter to settle with the master of a boat frequenting the wharf. The appellant asked him to come home, to which her husband replied that he was busy, that this was no place for her and to go away. The appellant, thereupon, gave him two slaps on the face and took from an outside pocket the bundle of notes which was protruding therefrom. At the same moment, Bonorchis cried out to her: "Take care what you do, that that money is not mine but Mr. Constantin's." A week or two having elapsed, and the money not having been paid to Mr. Constantin, nor any offer to reimburse him made to him by the appellant or her husband, this information was brought against the appellant, by which she was charged with stealing "the sum of Rs. 295 in "bank notes of ten rupees and fives rupees; "one of the bank notes bearing the figures "14730; the said sum not belonging to her."

After hearing evidence and considering the case, the Magistrate convicted the Appellant and sentenced her to six weeks imprisonment, against which judgment she has

brought this appeal which was supported on two grounds.

The first was that Mr. Ange Constantin had failed to prove that the money alleged to have been stolen was his property.

In regard to this, it is not the law in Criminal Cases that the property of the subject alleged to be stolen shall be as distinctly proved as in a civil action in which the ownership of that property is disputed. The Penal Code defines larceny as the fraudulent abstraction of any thing not belonging to the person himself who is charged with the fact, and here, though the book of Mr. Constantin was not produced, he himself distinctly swears that he had the sum of Rs. 295, in Bonorchis' hands on that day, accruing from freight. Then other witnesses swear to the roll of notes taken from the pocket of Bronchis himself, and one, especially, speaks of her coming on that day to her mother's house with a bundle of banknotes which her father and witness counted and found to contain Rs 255 and to whom the accused, appellant, said she had snatched the money for her husband's pocket at the wharf store. In the whole circumstances, the Court are clearly of opinion that there was sufficient evidence entitling the Magistrate to hold that a roll of notes of a large amount, not belonging to her, had been snatched by her and that it belonged to Mr Constantin, and that being a mere question of fact, the Court ought not to interfere with the Magistrate's judgment.

But the second ground raises a more delicate question : It was pleaded on behalf of the accused that the money was taken from her husband's person ; that she had nothing to do with Mr Constantin who had a right of claim against the husband if he chose to exercise it.

This argument is founded upon Article 302 of the Penal Code, by which it is enacted that " the abstraction of property, by " the husband to the injury of the wife, or " by the wife to the injury of the husband, " shall give rise to civil reparation only." Thls clause of our Penal Code is borrowed from Article 380 of the French Penal Code which establishes an immunity, not only as between husband and wife, but also between ascendants and descendants. The article shields from puuishment thefts to the prejudice of the spouses or to the prejudice of ascendants by descendants and is manifestly an exceptional law in their favour. In our Penal Code, this clause of immunity immediately follows the clause defining larceny itself. The Prosecutor is, of course, always bound to prove the charge made against an accused and to bring out all the facts of his case, but if an accused founds on this exceptional piece of legislation in his favour he ought to bring out all the facts and circumstances which raise this plea in defence to the charge. If the appellant wished to found upon this exception, she ought in the course of the proof to have brought out distinctly the position of her husband in reference to Mr. Ange Constantin, and that he was a man who held the regular and authorized status of a mandatory in reference to him. No proof whatever was led on this subject by her, and the references to this part of the case made by the prosecution are very meagre indeed.

Undoubtedly, the Courts in France have varied in the judgments they have pronounced in this matter. It is said that if the money is in the hand of the husband or father as a deposit, it is perfectly clear that the theft of such money by the wife or child will be a larceny. But it is a more delicate question if the money is in the hands of the husband or father as a mandatory, who is simply simply bound to account not for the " ipsum corpus " of the subject alleged to be stolen, but for a balance of account which may be due yearly, half yearly or at certain fixed dates. Two cases occur in the books upon this subject: The first reported in Sirez 1849—1—206, in which it was found that

the money not being in possession of the father in virtue of a deposit but of a mandate, which constituted him simply responsible as a mandatory, the daughter who had abstracted it could not be convicted.—It may be inferred from the facts of the case that the father there was the treasurer of an association for a special purpose who would divide among the members, at certain dates, the money which he had received on their behalf. In the other case reported in Sirey. 1840—I-731—the rubric is to the following effect: "La fille d'un comptable de deniers "public qui soustrait de l'argent dans la "caisse de son père, se rend coupable de vol "au préjudice du trésor." In that case, the Court on the ground that the accused could only be considered as an individnal completely foreign to the public administration, and that the wrong was not done to her father, and that he could not be considered as a mandatory of the Government, refused her appeals.

These decisions have been attempted to be reconciled by commentators on the ground that, in the last case, the person from whom the money was taken must be considered as a depositary bound to restore the identical thing he had received; whereas in the former case the accountant was clearly a mandatory responsible for the balance of the sums in his hands and for nothing else.

But what ought to be the judgment of the Court when the office held by the party from whom the money has been directly taken is not a regular and permanent mandate but when he is merely a servant bound to deliver over the balance of the actual monies which he has received whenever called upon to do so, perhaps daily? In the present case, all we see is that the appellant's husband was in charge of Mr. Constantin's wharf, that in virtue of that, upon a certain day, he had a fixed sum in his hands which Constantin swears belonged to him and not to Bonorchis. From this evidence we conclude that this man was bound to give over to his employer the "ipsum corpus" of the sums he had received, perhaps reduced by a payment he had to make in the course of the day. This view is confirmed by the fact which is sworn to, that the salary of appellant's husband was thirty Rupees per month and that he was paid monthly. This salary is only consistent with the fact that the man was in very inferior position and, therefore, not likely to hold a permanent and official position as mandatory of Mr. Constantin. We also interprete the words which were used by Bonorchis the husband when he called to his wife that "*she was taking away Mr. Constantin's money and not his,*" as meaning that he was to give the very notes that she had then in her hands to Mr. Constantin, that is, the *ipsum corpus*, that she was carrying away, was to be handed over to his principal. Supposing even that Bonorchis held the position of a mandatory to collect the freight it must be considered as of a temporary and transitory nature.

Here is a man without personal fortune, the temporary holder of considerable sums of money which his wife carries off, knowing perfectly well that the money could not be the property of her husband, and that it was impossible for her or for him to make reparation for the loss, is it possible to consider that the theft was committed to the prejudice of the husband? On the contrary, we have no doubt that the appellant knew perfectly well, as soon as she had counted the money which she had purloined, that the property thereof was not her husband's but Mr. Constantin's.

Holding, therefore, that the theft was not committed to the prejudice of her husband, we think that the appellant was rightly convicted, and we refuse this appeal, on both the grounds argued to us, with costs.

SUPREME COURT

—

DAMAGES— DEFAMATION— PRIVILEGED COMMUNICATION— TRUTH—PRO BONO PUBLICO— RASH CONDUCT—SPECIAL DAMAGE— PLAINTIFFS' CONDUCT—NOMINAL DAMAGE— COSTS.

In a case of damages for defamation, it was proved that the defendant (a parish priest) had asked a domestic servant "If he knew "what his master was doing so often at the "at the school of Plaintiffs; whether he "(the servant) did not know that the ru- "mour was that his master was living with Mrs. C (one of the plaintiffs.)' The defendant added also "Enquire as you "go down, and you will see whether the "thing is not true."

It was argued by the defendant that it was in the exercise of a right and in the honest belief that he had a duty to perform that he had that private conversation with the servant; that the allegations were true & made pro bono publico, the plaintiffs being at the head of a public school in the parish.

Held by the Court.

1o. *That there was no evidence of any impropriety having existed between Mrs C. and the servant's master.*

2o. *That the defendant acted rashly and indiscreetly when he spoke to the servant of the conduct of Mrs C. with his master.*

3o. *That, as a parish priest, he had no right to speak of two of his parishoners to another one, of the servant's standing especially, as he had done, and that it cannot be said that such a conversation was privileged or for the public benefit.*

4o. *That though the plaintiffs had proved no special damage, the Court would have been inclined to grant them more than nominal damages if they had not attempted during the trial to aggravate the position of the defendant by alleging false facts against him, and, if the Court were not also satisfied that they had not come before them with altogether clean hands.*

The Court granted Rs 50 *as damages and, considering that the case had been much protracted by the fact of the plaintiffs making the false charge, they were only allowed half their costs.*

—

CANAL & WIFE,—Plaintiffs.

and

PHILIPPINI,—Defendant.

—

Before

His Honor Sir E. J. LECLÉZIO, Kt.,— Chief Judge.

His Honor A. MURE,—Puisne Judge.

and

His Honor J. ROUILLARD,—Puisne Judge.

—

I. JOLLIVET,—Counsel for the Plaintiffs.
A. ROHAN,—Attorney for the same.

Hble. NEWTON,—Counsel for the Defendant.
H. THATCHER,—Attorney for the same.

—

Record No. 24,641.

9th May 1890.

The Plaintiffs in this case allege that they were married on the 8th March 1884, and were reputed to be persons of good fame and credit among their friends, and the public in general, and especially had the esteem and confidence of all the families whose children attend the school kept by them in the District of Black River, at the place called Case Noyale, and that they lived quietly and respected by every one up to the month of July 1888, when the Defendant, who is the curate of St. Anne, at Chamarel, greatly envying

the happy condition of the Plaintiffs, wickedly, falsely and maliciously intending to injure them in their good fame and credit and to bring them into public scandal and disgrace, and to cause them to be suspected and believed to be dishonest and unprincipled persons, did, in the month of August and September 1888, speak and tell to many persons the following—(among other) words, that is to say: She, Canal the wife, was and is " une mauvaise femme, elle a été la maî- " tresse de l'abbé Boucherit, et aujourd'hui " elle vit avec M. de Labutte qui est son " amant. "

The plaintiffs further allege that divers good and respectable persons of this island, after hearing what was said by the Defendant, suspected and believed, and still suspect and believe, that Canal the wife, if not a reputed prostitute, has been, at all events, the mistress of Abbé Boucherit, and of Mr. de la Butte, and Canal the husband, is " un mari complaisant ", and the said persons have refused to have any transaction or acquaintance with the Plaintiffs, as they otherwise would have had, to the prejudice and damage of the Plaintiffs in the sum of Rs. 20,000. The defendant denied having spoken of the plaintiffs in the terms mentioned in the declaration, and stated in his plea that, in his capacity of Curate of the parish of Ste. Anne, at Chamarel and of St. Augustin, at Black River, he was bound to look after the conduct and behaviour of his flock and this he did *pro bono publico*. The defendant added that, without admitting that he ever used concerning the Plaintiffs such words as those alleged, if he, however, in private conversation with Ferdinand de La Butte, Thomy de Rontenay and Mootien, expressed an opinion of Mrs. Canal which was not favorable to her, the occasions on which he did so were privileged. An additional plea was also filed by the Defendant, after some discussion in Court, in which he says that the matter charged in the declaration as defamatory is true, and that if the defendant did publish it, which he denies, it was for the public benefit that it was published.

Many witnesses were heard on both sides and the Court had to deliver several interlocutory judgments on the incidents which occurred during the trial.

The evidence may be summed up as follows: The plaintiffs appear to have been, both before and after their marriage, on very intimate terms with abbé Boucherit who before he was sent to the District of Black River, in 1883, was a priest in Port Louis. Canal was, in January 1884, appointed by the abbé who was the Manager thereof, as schoolmaster of St. Augustin at Black River, and he soon after, on 8th March, married the other plaintiff, Mrs. Canal, who started a school at Petite Rivière Noire, on Pierrot's alias Boileau's, property, in the second part of the year 1884, and obtained through abbé Boucherit its affiliation to the aided school of Black River, in December 1884.

Mrs. Canal's school appears to have been transferred later on to Petite Case Noyale, on the property of Mr. D'Argenteuil de La Butte, and, afterwards, to Grande Case Noyale on the property of Mr. Ferdinand de La Butte. The church and school of St. Augustin depended at first from the parish of St. Sauveur at Bambous, and the Curate of St. Sauveur, who was, in 1884, abbé Boucherit, had his principal residence at Bambous, and the School of St. Augustin was kept, at first, in the sitting room of the Parsonage of St. Augustin where the Plaintiffs resided. The Defendant was then Curate of St. Anne, Chamarel, but it was only about the middle of 1887 that he was also put in charge of St. Augustin, and became the Manager of the School of that name. Altho', in the meantime, Mrs. Canal's School had been removed to Grande Case Noyale, which is within the parish of St. Anne, the Defendant appears to have kept aloof from that

School, and it has been shown that, even in 1885, he had refused to go to teach Catechism in Mrs. Canal's school, and the Defendant has declared that the reason of his abstention was that he heard of improper conduct between her and the Abbé Boucherit. — When he was put in charge of St. Augustin, Defendant, however, went to teach catechism in the school kept by Mr. Canal, and of which he had become the Manager, but after a very short time, the Defendant dismissed Mr. Canal, namely, on the 30th January 1888. The Defendant says that he dismissed Mr. Canal because he was dissatisfied with his way of conducting the school, and he had received complaints from several parents of the children who frequented the school. But the Plaintiffs give a very different reason of this dismissal, and they say that on the 16th January 1888, Mrs. Canal having replaced, at St. Augustin, her husband, who was unavoidably absent, the Defendant, as soon as he entered the school, made indecent proposals to her which she refused, and Mr. Canal, having on the Monday following reproached the Defendant with his conduct, the Defendant resolved to get rid of him, and having spoken ill of him to several parents in order to encourage them to bring complaints against him, and failing to obtain a serious manifestation against him, the Defendant, on the 30th January, expelled him from the school having no other grounds but his spite and anger. The reasons given by the Defendant for the dismissal of Canal do not completely satisfy us, but, at the same time, we must say that the scene which was depicted to us by Mrs. Canal, as having taken place on the 16th. January, in the school of St. Augustin, is, to our minds, simply incredible. The pupils were in a contiguous room, the door was only pushed to, one of the windows was open, there was, according to Mrs. Canal, a workman close to the verandah waiting for his money, but he was not called as a witness; besides, the previous attitude of the Defendant towards Mrs. Canal, his refusal to go and teach catechism in her school and the subsequent acts of the plaintiffs render still more improbable the facts whic are said to have occurred on the 16th. The scene of apology or explanations, which Canal has described to us as having taken place between him and the Defendant on the 23rd January, is as incredible as the scene of the 16th. According to Mrs. Canal, she had the greatest difficulty, after she had related to her husband the improper conduct of the Defendant towards her, in preventing him from inflicting blows on the person of the Defendant, and, yet, we have from Mr. Canal that on the 23rd, after a lame explanation given by the Defendant, he was satisfied and even shook hands with the Defendant as good friends. The Plaintiffs wrote and spoke to the Bishop of Port Louis several times after the 30th January, and they never alluded to the scene of the 16th; on the contrary, Mrs. Canal complained to the Bishop that the Defendant refused to go and teach catechism to her pupils in the school. It is only in the course of her examination that Mrs. Canal wanted to relate what had taken place on the 16th January, and as no mention of that scene had been made in the notice of facts, her evidence of that fact was objected to, and it was only at a subsequent sitting, that she was allowed to depone as to that scene. Canal, at first, stated in court that he never mentioned to the Bishop the improper conduct of the Defendant towards his wife, but, at a subsequent sitting, he said she did so, yet, the Bishop, who was heard a a witness, has most emphatically denied that Mr. Canal, at any time, mentioned such a fact to him; we believe the clear and strong affirmation of the Bishop to be true. We must, therefore, reject altogether as unfounded the motive which the Plaintiffs gave as the principal cause of Mr. Canal's dismissal and of the subsequent conduct of the Defendant towards them. Another motive which has been given by the Plaintiffs is that the Defendant was a friend of

Mr. D'Argenteuil Labutte, who is on bad terms with Mr. Ferdinand Labutte, and Mrs Canal having left Petite Case Noyale to go to Grande Case Noyale, and the school kept on Mr. D'Argenteuil Labutte's premises, after her departure being less prosperous than the one kept by Mrs. Canal on Ferdinand Labutte's property, the Defendant had tried to ruin her School to give satisfaction to his friend D'Argenteuil Labutte. There is no doubt that there was a strong rivalry of schools in that locality and that it may have been due partly to the unfriendliness existing between the two Labutte families; there is also no doubt that the Defendant had fallen out with Ferdinand Labutte since 1883, on account of an article against him and attributed by him to this latter and published in a newspaper in Port Louis; but it also appears from the evidence that, in 1885, at a time when Mrs. Canal's school was not yet at Grande Case Noyale, the Defendant had refused to visit it on grounds which had been held, as sufficient by the late Bishop Scarisbrick, and which the Defendant has declared to be moral grounds. Whatever may have been the motives of the Defendant for speaking the words complained of, let us now see what is the evidence with regard to the alleged defamation.

The first witness called by the Plaintiffs to prove their allegations was Mr. Thomy de Rontaunay, a nephew of Mr. Ferdinand Labutte, and Manager of Chamarel Estate. Mr. Rontaunay was on friendly terms with the Defendant, they visited each other, and he was the President of the Conseil de Fabrique of Ste. Anne. Mr. de Rontaunay stated that in a private conversation which the Defendant had with him in the Sugar house of Chamarel, in April, May or June 1888, with the view of inducing him to obtain from his uncle Ferdinand Labutte that he should dismiss the Plaintiffs from Case Noyale school, the Defendant said that his reasons for so speaking to him were that Mrs. Canal had been the mistress of Abbé Boucherit, that she was a bad woman and that Dargenteuil Labutte was much pained to see these persons on Ferdinand Labutte's premises. Rontaunay did not speak to any body of this conversation, which the Defendant wished to be considered as private, until the month of August when he mentioned it to his uncle, after the unpleasant scene which took place between this latter and defendant, and which will be afterwards referred to. Rontaunay is the only witness to whom the Defendant spoke of the relations between Mrs. Canal and abbé Boucherit. In the month of August, the Defendant, meeting Mootien, a carrier, who lived on the premises of Ferdinand Labutte at Case Noyale and whose wife has been brought up by Mme Labutte—took him apart near the church of St Anne and asked him if he knew what Ferdinand Labutte was doing so often at the Canal's school and whether he did not know that the rumour was that he was living with Mrs Canal, and the Defendant added: Enquire as you go down and you will see whether the thing is not true. Mootien repeated the day after to Ferdinand Labutte what the Defendant had told him, and the result was that Mr. Labutte, having written to the Defendant to come and see him, a most painful scene occurred under the verandah of Mr. Labutte, which was heard by Mme Labutte, who was in a room close by, and during which the Defendant, according to the evidence of Mr. and Mme Labutte, repeated what he had said to Mootien. Such are the main facts resulting from the Plaintiff's evidence upon the difamatory words alleged in the declaration. We must here observe that this evidence does not show exactly what was averred in the declaration, namely that the Defendant repeated to many persons the whole of the slanderous words complained of at about the same time, as if he had been going to one after the other

accusing Mrs. Canal of having been formerly the mistress of Abbé Boucherit and then of Mr. Labutte. To Mr. de Rontaunay, he spoke two or three months before he spoke to Mootien, and he said nothing to him (Rontaunay) of Mrs. Canal's relations with Labutte; and when he spoke to Mootien in August he made no allusion to the conduct of Mrs. Canal with abbé Boucherit. This has its importance with regard to the animus or spirit which led the defendant to speak as he did.

The Defendant's version of his conversation with Rontaunay is somewhat different from his, as to the details; but we do not think that the words admittedly made use of by the Defendant can be construed otherwise than Rontaunay did. With regard to defendant's version of his conversation with Mootien, the difference is greater. The Defendant says that he only made enquiries about the relations of Mrs. Canal with Labutte, but made no affirmation—Mootien's deposition is, however, supported by Mr. & Mrs Labutte and we must say that the weight of the evidence is in favor of the Plaintiff's witnesses upon that point. It was argued for the Defendant that it was in the exercise of a right, and in the honest belief that he had a duty to perform, that he had those private conversations with Rontaunay and Mootien, and that the scene at Ferdinand Labutte's was one which was provoked by Labutte himself, who wrote to the Defendant that he was ill and wanted to see him without saying for what purpose, and, on his arrival, began to use strong language against him. With regard to the Defendant's conversation with Rontaunay we are not prepared to admit that the defendant can invoke a qualified privilege, when he, being the parish priest, went to see Rontaunay and spoke to him of the antecedents of the School Mistress of a school whose manager was Rontaunay's uncle, with the object, as he says, of safeguarding the dignity of an elderly gentleman. On that occasion, however, the Defendant appears have acted with a certain degree of discretion, Mr. de Rontaunay being then the President of the Fabrique of his Church, and the communication being made to a man from whom, on account of his standing and education, the Defendant might have expected that his conversation would remain private, as he desired it. Besides, altho' we think that certain depositions, namely, those of Manentia and Boodee, representing Mrs. Canal as having committed acts of adultry with Abbé Boucherit, should be set aside as untrustworthy, still, there is sufficient reliable evidence to show that there was not between her and the Abbé that propriety of conduct which should be observed between a young woman and a priest, but on the contrary that there existed between them an intimacy of a nature which could easily give rise to strong suspicions and which fully accounts for the reports concerning those two parties. We are, therefore, inclined to attach little importance, in so far as the issue of this case is concerned to the conversation which took place between the Defendant and Rontaunay. But the conduct of the Defendan when he spoke to Mootien, as he did in August 1888, cannot be looked upon by us in the same light. If the Defendant really thought that there was something improper in the fact that a man of Mr. Labutte's age should have visited the school of which he was the manager, as often as four times a day, he might have employed other and more discreet means to induce Mr. Labutte to be more reserved in his visits to Mrs. Canal's school than to speak to a man like Mootien, and more especially in the words which he used.

Upon this part of the case there is absolutely no evidence which can induce us to belive that there was ever any impropriety between Mrs. Canal and Mr. Ferdinand de Labutte, and we must, therefore, come to the conclusion that the Defendant acted rashly

and indiscreetly when he spoke to Mootien of the conduct of Mrs. Canal with Mr. Labutte.

We cannot know what may have been his motives and intentions, but there is no doubt that, as a parish priest, he had no right to speak of two of his parishioners to another one, of Mootien standing especially, as he did on that occasion ; and it cannot be said that such a conversation was privileged or for the public benefit.—The Defendant certainly then exceeded the limits of the reserve within which he should have kept, even if he was convinced that there was something wrong going on at the Cave Noyale School. We are, therefore, of opinion that, leaving aside for the reasons already explained that part of the averment concerning the relations between Mrs. Canal and Abbé Boucherit, still the Plaintiffs are entitled to a verdict upon that part of the avernment which refers to the words spoken by the Defendant concerning the relations of Mrs. Canal and de Labutte.

The Plaintiffs have proved no special damage. On the contrary it results from the evidence that their school is at least as prosperous as before, but we would, nevertheless, have been inclined to grant them more than nominal damages, although the publication proved of the slander was very limited before action brought, if it were not for their conduct pending the trial.

They have tried to aggravate the position of the Defendant by reciting facts, such as the scene of the 16th. January and the alleged discovery of certain instruments and medicines in the presbytery of St. Augustin, as being the property of the Dofendant, facts which they have been unable to prove and which we believe to be untrue ; besides, referring to some features of their past history, we are not satisfied that they have come before the Court with altogether clean hands.

We think, for all these reasons, that by granting them Rs. 50 damages, justice will be done to this case.

As to the question of costs, we are strongly of opinion that the case has been much protracted and the evidence much prolonged by the attitude of the Plaintiffs making the charge against the Defendant of the 16th January 1888, in the midst of the trial ; chiefly on this ground, we cannot give them more than half of their costs.

SUPREME COURT

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LIFE INSURANCE POLICY — TRANSFER — ORDINANCE 35 OF 1881 — HEIRS — QUOTITÉ DISPONIBLE—LAW OF SUCCESSION—CONVEYANCE DONATIO INTER VIVOS — ARTICLES 920, 922 C. C.

A party three days before his death transferred part of his Life Poliy to certain minors and the other part to his lawful wife.

One of the heirs of that party asked the Court, to decree :

1o. *That the transference was a fictitious transaction made to secure the Policy to the aforesaid minors and wife, to the prejudice of the legitimate children of the "de cujus."*

2o. *That, at all events, if the transference was not altogether null and void, it was reducible, as a "donatio inter vivos", to the portion disponible ; one fourth, in the present case.*

The widow pleaded :

1o. *That under Article 1 of Ordinance 35 of 1881, a Policy of Insurance effected by any man on his own life and expressed upon the face of it, or by a subsequent declaration or assignment, to be for the benefit of his wife, children etc., shall be good and valid, without it being necessary to insert the name of the wife, children etc.*

2o. *That under Article* 3, *a Policy assigned as above does not form part of the Estate of the assured, but belongs to the party in whose favour the assignment has been made.*

By the Court :

1o. *There is nothing in the Ordinance of* 1881 *declaring that the Common Law of succession of the Colony, which is contained in the Civil Code of France, is affected in the slightest degree by its provisions.*

2o. *That it may be inferred both from the circumstances in which the Ordinance was passed and from the terms and language used in it that the Legislature had chiefly in view to protect Life Policies from creditors, and, benevolently, to preserve something for the wife and children of one who had been unfortunate.*

3o. *That, in France, in every possible kind of policy which can be imagined, the produce of the policies has been held subject to distribution under the general law of succession, even when the sum of the Policy could not be said to be part of the Estate Insured.*

4o. *That Article* 1 *of Ordinance* 35 *of* 1881 *must be held merely to secure the validity of a policy, and to protect such a policy from creditors, but it cannot be supposed that it was intended thereby to alter the whole law of succession in Mauritius as between heirs in the case of the produce of the Insurance Policies, and in no other case or set of circumstances.*

5o. *That the declaration endorsed on the policy must be held to be a conveyance in favour of the defendant of the "quotité disponible"; but that the defendant was liable towards plaintiff for his share in the balance of the amount which, as above, came into her hands.*

6o. *That the plaintiff had no title to claim that the whole balance should be paid back to the succession, because the other children of the "de cujus" might acquiesce in the provision which he had made for his widow — and that the widow could not be held responsible for that part of the policy transferred to certain minors who had not been made parties to this case.*

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MOUTOU,—Plaintiff.

and

WIDOW VAYABOURY AND OTHERS,—Respondents.

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Before

His Honor A. MURE,—Acting Chief Judge.

His Honor J. ROUILLARD,—Puisne Judge.

and

His Honor E. DIDIER ST. AMAND, — Puisne Judge.

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A. HUGUES,—Counsel for Plaintiff.
L. DE ST. PERN,—Attorney for the same.

V. K[VERN,—Counsel for Defendant.
L. LAFITTE,—Attorney for the same.

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Record No. 24,954.

12*th. June* 1890.

On the 5th. April 1883, Selvarayen Mourga Vayaboury insured his life with the *Whittington Life Assurance Company* for the sum of ten thousand rupees.

On the 8th of August 1885, the following transference was written on the back of the policy and registered in the books of the said Company : "Je soussigné déclare transférer (Rs. 1,500) mil cinq cents roupies à "Louis Michel Cassadin, Rebecca Cassadin "et Louise Cassadin ; et (Rs. 8,500) huit "mille cinq cents roupies à mon épouse, en "cas de décès de cette dernière, à mes enfants

" légitimes. Le dit transfert doit être ins-
" crit sur le Registre de l'Assurance tenu
" à cet effet."

Selvarayen died three days after he executed this disposition, to wit; on the 11th. August 1885. He was survived by his widow and four children.

Out of the sum of ten thousand rupees, the Respondent, his widow, has received from the Insurance Company eight thousand five hundred rupees, and the balance of fifteen hundred rupees has been paid by the Company to the three minors Cassadin. One of the daughters, Anne Roselia Mourga Vayaboury, was married to the plaintiff Moutou, and died, after she had inherited one-fourth of her father's succession, leaving a minor son. This minor son has also become the assignee of a son of Selvarayen and is thus in right of half of his succession. The present action is brought in his name by the plaintiff.

It is alleged in the declaration that the transference in the Policy above mentioned was made without cause or consideration, and is a fictitious transaction made to secure the minors Cassadin and the defendant widow in the possession of the Policy to the prejudice of Selvarayen's children and to defeat their rights, and that the sum of eight thousand five hundred rupees has been wrongly received by the widow and that she is bound to account for the same to the succession of Selvarayen. It is further alleged that even if the transference be good it is reducible to the "Portion disponible" that is to one-fourth of the estate and succession of Selvarayen, which does not exceed in all sixteen thousand rupees, and, therefore, the "portion disponible" does not amount to more than four thousand rupees. On this footing, the plaintiff concludes that the Court should hold that the transfer of eight thousand five hundred rupees to the defendant is null and void, and that the defendant ought to reimburse and pay to the succession of the said Selvarayen the sum of eight thousand five hundred rupees. There is a second conclusion to the effect that, in case the said alleged transfer is considered valid as a donation *inter vivos* fixing to the sum of four thousand rupees the "quotité disponible" of the Selvarayen's succession, and then condemning the defendant to pay to that succession the sum of six thousand rupees, which sum in the conclusion of the declaration is described to be: "The amount "by which the said sum of ten thousand "rupees of the said Policy of Insurance is "then reductible by law, comprising in the "said 'quotité disponible' of four thousand "rupees, the donation of fifteen hundred "rupees already made to the minors Cassadin "as before mentioned."

The plea of the defendant was entirely founded on the text of the Ordinance No. 35 of 1881, by the first clause of which it is enacted that a Policy of Insurance effected by any man on his own life and expressed upon the face of it or by subsequent declaration or assignment to be for the benefit of his wife, and of his children, and grandchildren born or to be born, or of either or them, shall be good and valid without it being necessary to insert the name of the wife, children and grandchildren in such Policy declaration or assignment. By the third article of the same Ordinance it is enacted that the amount of any Policy effected or assigned, as mentioned in article first, shall not form part of the estate of the assured, but shall belong to the Party in favor of whom such Policy declaration or assignment shall have been made. This clause goes on to state in a Proviso, that if the steps mentioned shall be proved to have been taken with intent to defraud creditors, then the creditors of the assured are entitled to claim out of the proceeds of the Policy the amount of the premiums so paid. Founding on the text of this Ordinance, it was

strongly argued that the defendant was not bound to restore the proceeds of the Policy to the succession and that from the facts that the rights of creditors were protected and a reservation made in their favor, it ought to be infered that no reservation was necessary in regard to heirs, and therefore that the Legislature had not saved their rights.

There is not a word in the Ordinance declaring that the common Law of Succession of the Colony which is contained in the Civil Code of France is affected in the slightest degree by its provisions. The Legislature must be held to have known what the Law of the land was, and it is strange to think that the Ordinance has been so framed and passed the Legislature of the Colony in such a shape, that important and delicate points of Law must arise under it, and that questions affecting the Law of Succession in almost every family of the more affluent classes of the Island, are left *in dubio*. To all heads of families who take the precaution of providing for the contingencies of the future by insuring their own or their wives' lives, or by taking a policy in favour of their children, the terms and the effect of this Ordinance are of the highest importance.

In 1880, occurred in the Supreme Court of this Colony the case of Georges versus Bruniquel (Reports of 1880; P. 67) in which the Court hold that a stipulation in a life Policy in favour of a third party must be made to a precisely determined person or persons, and that the declaration written on a policy by one assured, whereby he benefitted his children by withdrawing the sum insured from the assets of his succession, was null and void because it was made not only to his children then living but also to those to be born thereafter, *i. e.*, to parties future and uncertain, and it was therefore ordered that the sum due by the Life Insurance Company should be paid to the creditors of the insured. From the report of this case, it appears that a declaration similar to the one existing in this case had been written on the margin of the Policy and was in use by Standard Life Assurance Company, one of the largest companies of the kind in the world. It would appear that these declarations are of long, continued and general use in Life Policies, and that they are applied to all the various circumstances of human life.

It may be assumed that the Ordinance under consideration was passed to obviate the supposed inconveniences arising from the decision in Bruniquel's case, its leading object being to ensure the validity of Policies of Life Assurance effected for the benefit of married women and children, and it may be enferred both from the circumstances, in which the Ordinance was passed, and from the terms and language used in it that the Legislature had it chiefly in view to protect Life Policies from creditors, and benevolently to preserve some thing for the wife and children of one who had been unfortunate.

In considering the question how the Ordinance should be interpreted it is important to keep in view the jurisprudence of the Courts in France on Life Assurance Policies, in those cases in which questions similar to the present were raised.

The Court of Cassation in 1888 (S.V. 1888, 1. 121.3e. espèce) decided a case in which the Insurance Company had in the Policy of Insurance bound themselves at the request of the Insurer to pay the sum in his policy to his three children *nominatim*, and, in the case of the decease of any of them then to their children and heirs. The Insurer subsequently married a second wife who, though it was strongly argued that the amount insured never formed part of the Insurer's patrimony, was held entitled to demand that the sum in

the policy should be reckoned as part of the succession of the insurer, so that her claims should be increased. At the same time the Court decided that at whatever period of time the third party favoured may have been designated, and, consequently, vested with the amount of the insurance, the stipulation made in his favour by a purely gratuitous title in terms of Article 1121 Civil Code constitutes a veritable donation to which are applicable the general rules concerning "rapports", whether it be necessary to preserve the equality of the shares between co-heirs, or to determine the amount of the reserve, or of the "quotité disponible." To the same effect are the following decisions: S. V. 1875, 1, 107; S. V. 1878, 2, 272; S. V. 1880, 2, 249; S. V. 1881, 1, 337.

There are many other decisions to the same effect which have been given by the Courts in France on questions similar to that which this Court has now to determine, and the result of all of these is just this, that in every possible kind of policy which can be imagined, whether it be taken directly, or assigned, or indorsed by a mere declaration to a third party, to a wife, or to a favoured child or children, the produce of the policies has been in every case held subject to distribution under the general Law of Succession of France, and that this was the case even when from the form of the policy, the sum therein could not be said to be part of the estate of the Insured. It is true that these decisions have been severally criticised in almost every report by Mr. L'Abbé and others, who express surprise at the result to which the Courts were arriving, and declare that there was a great necessity for legislation on the subject in France. But granted all that the learned critics assert, it yet remains the fact that by a long series of decisions of Courts and Judges of the highest authority the principles now mentioned have been fully established as the Law of France.

These principles being settled law in cases similar to the present, and turning to the Ordinance, with which we are now dealing, we have to observe that the essential parts of these judgments are not at variance with, and are not contradicted by any clause of the Ordinance. The first Clause was undoubtedly meant to obviate the difficulty arising from a provision in favour of uncertain persons, who might come into existence subsequent to the date of a declaration made on a policy, or of the policy itself taken in their favour. Though this clause does declare that a policy of Assurance, the produce of which is to be for the benefit of others than the person insured, shall be good and valid without it being necessary to insert the names of the wife, the children or grandchildren; it must be held merely to secure the validity of the Policy, in such circumstances, and, combined with an other clause to be referred to hereafter, to protect such a policy from creditors, but it cannot be supposed that it was intended thereby to alter the whole Law of Succession in Mauritius. Proceeding to the 5th clause, it is enacted that the registration of transfers in the books of the Insurance Company shall duly vest the favoured party with the rights resulting from the assignment or transfer of a policy. We have no doubt that the title to deal with an Insurance Company is by this clause given to the party in whose favour the provision is made, and that such party is entitled validly to discharge the sum in the Policy. But that principle runs through the whole decisions of the French Courts, and is brought out prominently in the decision of the Court of Paris of 1879.

The third clause of the Ordinance enacts that the amount of any such policy shall not form part of the estate of the assured, but shall belong to the parties in favour of whom such policy, declaration or assignment shall have been made. The clause ends with

a "proviso" which enacts that if there be proof of an intention to defraud creditors, it shall be competent for them to claim out of the proceeds of the policy the amount of the premiums which have been paid. No doubt we have here a text of the Law which gives a colour to the defendant's contention. But we think that the Legislature only meant that the whole Section must be read together, and that the proviso indicates distinctly that it was intended to protect such policies against creditors. Nor can we suppose that it was meant to change the whole Law of Succession as between heirs in the case of the produce of Policies of Insurance, and in no other case or set of circumstances. If anything so general and so sweeping had been intended, it would have been distinctly enacted. We are not dealing with a system of law, in which a father of a family is entitled absolutely to dispose of his property, as he pleases, and, if he likes, to reward a good son, to bequeath to him his whole estate, and to punish a bad son by disinheriting him entirely, or restricting his right to a liferent or small annuity.

But we have to deal with a law of compulsory succession, in which a spirit of equality towards all the children of a family reigns supreme, and in which a wife has certain fixed rights which cannot be exceeded or diminished. To accomplish this, all donations to a wife or to a child, or even provisions to a daughter in contemplation of her marriage must fictitiously, as it is called, be reckoned as part of a deceased's estate, and form part of the mass of the succession, so that there may be an equal division among the children. In the present case, Selvarayen having died leaving four children, was entitled to dispose by Testament only of one fourth of his estate. The declaration he made in the policy in favour of the minors Cassadin and of his widow disposed of almost his whole estate. But this would be quite contrary to the provisions of the Law of Succession in the Code, and especially of Articles 920 and 922, by which it is enacted that all "dispositions" either "inter vivos or mortis causa" (i. e. by Testament) which shall exceed the disposable share "quotité disponible" shall be reducible to such proportion at the time of the opening of the succession, and by the latter clause the reduction is fixed by forming one mass of all the property, existing at the death of the Testator or donor, and after adding all the donations he has given away and deducting the debts, a calculation is made upon the whole property of the proportion which he was empowered to dispose of.

Special forms of donation are prescribed by the Civil Code to prevent this equality of division of property being eluded. But to these we do not refer further, than to say that they do not seem to affect a sum in a Policy of Insurance, which is a contract *sui generis*, and which is not referred to in any way in the Civil Code. All the decisions of the French Courts speak of these provisions in Life Policies as "liberalities" or donations, and we see no reason to depart from that view, especially as the 5th. Section of the Ordinance vests the sum in the policy in the person who has acquired a title to it. We cannot for this reason sustain the first conclusion of plaintiff's declaration and give decree holding the transfer of the eight thousand five hundred rupees to defendant as null and void, and ordering her pay to the succession of Selvarayen the said sum of eight thousand five hundred rupees.

But, on the other hand, there is nothing in the Ordinance, which is inconsistent with, or prevents the operation of the Common Law. The declaration endorsed on the policy must be held to be a conveyance in favour of the defendant of the "quotité disponible", but she must also be liable to account to the plaintiff minor for his share of the balance of the eight thousand five hundred rupees which came into the

defendant's possession in virtue of the declaration. The plaintiff can only sue for his own rights, and cannot in the absence of the other heirs, pursuing for their rights, claim that the whole balance shall be paid to the succession of Selvarayen. He has no title to claim that the whole sum beyond the "quotité disponible" shall be paid back by the defendant te the said succession. It may be that the other heirs of Selvarayen may acquisce in the provision which he made for his widow, and allow their share to remain in her hands. In like manner we cannot hold that the defendant is responsible for the fifteen hundred rupees which were paid to the minors Cassadin in virtue of another clause of the declaration on the Policy. We do not know who these minors are, or in what circumstances that sum was given to them, and as they are not parties to this action, it is impossible for us to say what defence they might have to any claim made against them. Further, the defendant has produced a Tutory account in which a sum is brought out by the plaintiff's mother as due to her, and though the plaintiff offers to hold the whole amount of the estate at the sum of sixteen thousand rupees and says that in that way he raises the "quotité disponible" it is apparent that, at the same time he raises the balance of the reserve and the amount that is due to him.

The inventory of Selvarayen's estate which is produced, contains only a few rupees worth of furniture. The Court cannot accept this sum of sixteen thousand rupees as the estimated value of the estate, and in the circumstances which show that an accounting must take place between the parties, we remit this case to the Master to hear parties on the accounts between them, and that, on the principles now stated, he may bring out the sum which is actually due by the defendant to the plaintiff; costs reserved.

SUPREME COURT

CERTIORARI — ARTICLES 335 AND 382, PARAGRAPH 10 P. C. — ORDINANCE 21 OF 1851, ARTICLE 40 — MUNICIPAL REGULATIONS OF 15TH. MARCH 1852 — INFORMATION UNDER ARTICLE 335—DECISION REVERSED — ARTICLE 335 P. C. STILL IN FORCE.

1o. *Article* 40 *of Ordinance* 21 *of* 1851, *which establishes a Municipal Corporation for Port Louis, gives power to the Municipality to regulate a number of matters, including the suppression of gambling, which before found a penal sanction in the chapter of contraventions in Ordinance* 6 *of* 1838.

2o. *Municipal Regulations No.* 83 *of March* 1852 *when drafted to replace for the town of Port Louis paragraph* 10 *of Article* 382 *Penal Code, was worded so as to render the working of that paragraph more easy and the meaning of the Legislator more clear; but neither in expres terms nor by implication does it abrogate Article* 335 *of our Penal Code.*

3o. *Like paragraph* 10 *of the Article* 382 *Penal Code, which it has replaced, this Municipal Regulation was intended to work together with Article* 335 *Penal Code and not to supersede it, the Municipal regulation providing for specific cases of lesser gravity and Article* 335 *of the Penal Code providing, as before, for those cases which were of a more serious nature.*

4o. *Article* 335 *Penal Code declares that the fact of keeping or establishing a lottery is a misdemeanor; but when this takes place in a public place or a place open to the public, where of necessity, the act is a temporary one, it is simply a contravention punishable by the Municipal Regulation.*

5o. *As the Information in this case disclosed the more serious offence, the decision of the District Court, by which the accused had been discharged, was reversed.*

THE PROCUREUR GENERAL,—Plaintiff

and

THE JUNIOR DISTRICT MAGISTRATE OF PORT LOUIS AND ASSECK AND ANOTHER,—Defendants.

—

Before

His Honor A. MURE,—Acting Chief Judge.

His Honor J. ROUILLARD, — Puisne Juqge.

and

His Honor E. DIDIER ST. AMAND, — Puisne Judge.

—

L. A. THIBAUD, — Acting Substitute Procureur General—Counsel for Plaintiff

J. GUIBERT, Attorney, — Attorney for the same.

Hon. W. NEWTON,— Counsel for Defendant.

—

Record No. 35,068.

4th July 1890.

One Asseck was charged before the Junior District Magistrate with having established and kept a lottery in Fanfaron street, in the District of Port Louis, and one Ackee and one Ahseep with having aided and abetted the said Asseck in the means of perpetrating the aforesaid misdemeanor.

This charge was prosecuted under Article 335 of Ordinance 1838 and the Magistrate ruled that the Municipal Regulation No. 80 of March 1852 was now the only law which applied in Port Louis to the offence of keeping and establishing a lottery. As a consequence of this first judgment, the offence being a contravention, Ackee and Ah-Seep who were charged as accomplices were acquitted and the prosecutor not appearing the charge against Asseck was dismissed.

The Substitute Procureur General then moved the Court for a writ of certiorari against the Junior District Magistrate in order to obtain the reversal of these several judgments.

Mr. Thibaud, Substitute Procureur General, argued 1o. that Art. 335 had not been repealed by the Municipal Regulations, and 2o. that the law did not give the Municipality the power to do away with Art. 335 of Ordinance 6 of 1838; 3o. that Regulation No. 80 of March 1852 was repugnant to the Penal Code of the Colony, that it was "*ultra vires*" and was therefore invalid. Mr. Newton, in answer stated that gambling and lotteries were not offences per se, but offences created by the law and that the organic law (Art. 40 of Ordinance 21 of 1852) gave the Municipality the power to suppres, gambling and that this power included all cases of gambling and was to be exercised by means of regulations by which the legislator intended to modify the Penal Codes that in fact it was a power to abrogate and newly regulate the whole matter, that the Municipality had not therefore exceeded this power, and competently enacted rules concerning lotteries within the District of Port Louis.

Before the Municipal regulations of 1852, Ordinance 6 of 1838, whichis the Penal Code of this Colony, was the only law which referred to gambling houses and lotteries. Art. 335 enacted generally that to keep a gambling house or to establish or keep a lottery was a misdemeanor punishable by imprisonment not exceeding six months and by a fine not exceeding £ 100, and the legislator in the chapter of contraventions Art. 382 par: 10, made it a contravention punishable by fine, and even, according to circumstances, by imprisonment not exceeding four days to establish any game of chance in a street, road, public place or square.

The distinctions created by Article 382 are easily explained by the greater facilities

SUPREME COURT OF MAURITIUS

His Honor Sir E. J. LECLÉZIO, Chief Judge.

His Honor A. MURE, Puisne Judge.

His Honor FRÉDÉRIC CONDÉ WILLIAMS, Puisne Judge.

His Honor JOHN ROUILLARD, Puisne Judge.

The Honorable LIONEL COX, Procureur and Advocate General.

L. A. THIBAUD, Acting Substitute Procureur General.

E. DIDIER ST. AMAND, Master.
C. D'EMMEREZ DE CHARMOY, Esq., Registrar.

L. ISNARD, Chief Clerk and Assistant Taxing Officer.

VICE-ADMIRALTY COURT

His Honor Sir E. J. LECLÉZIO, Chief Justice, Judge.

The Honorable A. MURE, Judge Surrogate.

The Honoroble LIONEL COX, Queen's Advocate.

G. RITTER, Registrar.

J. J. BROWN, Marshall.

J. GUIBERT, Queen's Proctor.

COURT OF BANKRUPTCY

JUDGE :—THE MASTER OF THE SUPREME COURT.

GEO. NEWTON, Accountant in Bankruptcy.

H. B. DOWSON, Registrar of the Court of Bankruptcy.

COUNSEL (actually practising)

Leclézio, E.	1828	Lionnet, E.	1870	Kœnig, E.	1884
Bazire, E.	1858	Desenne, O.	1871	Noël, M.	1885
Martin Moncamp, P. G.,	1861	I. Jollivet	1873	Serret, E.	1887
Delafaye, V.	1864	Mathews, F.	1876	Herchenroder,	1888
Chastellier, P. L.	1864	Hewetson, H.	1876	Leclézio, L	1888
Guibert, G.	1864	Hugues, A.	1877	Vandagne, E	1888
Newton, W.	1864	Colin, R.	1878		
Lepoigneur, I.	1864	K/Vern, V.	1880		
Galéa, H.	1867	Laurent, O.	1883		
Beaugeard, P.	1868	Jenkins, D.	1884		

ATTORNIES (actually practising)

Lalandelle, G.	1842	Halais, J.	1865	Ducasse, V.	1879
Hewetson, W.	1846	Sauzier, E.	1866	Leclézio, H.	1880
Laurent, E.	1846	Commarmond, A.	1867	Edwards, W. H.	1881
Mercier, J.	1848	Rousset, C.	1870	Colin, E.	1882
Colin, A. J.	1851	Wohrnitz, L.	1870	Huteau, E.	1882
Guibert, J.	1853	Rolando, A.	1871	Leblanc, M.	1884
Finniss, W.	1853	St. Pern, L. de	1871	Marjolin, V.	1884
Duvivier, Ed.	1854	Ganachaud, E.	1871	Chaperon, D. O.	1885
Chazal, P. E. de	1860	Lastelle, F.	1872	Bernard	1887
Victor F.	1861	Leblanc, W.	1872	Piarroux, S	1887
Mallet, F.	1861	Arnal, C.	1873	Robert, F. (junior)	1887
Ducray, V. G.	1861	Kœnig, G.	1874		
Sicard, N.	1862	Bouloux, G.	1876		
Simonet, F.	1863	Thatcher, H.	1876		
Pitot, A	1863	L'hoste, A.	1877		
Bétuel, V.	1863	Leblanc, E.	1877		
Boullé, A.	1863	Herchenroder, G.	1877		
tter, G. A.	1864	Lafitte, L.	1878		
han, A	1864	Chaillet, E	1878		

DECISIONS

OF THE

SUPREME COURT, VICE-ADMIRALTY COURT

AND

BANKRUPTCY COURT

OF

MAURITIUS

1890

PART III

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EDITED BY

ARTHUR THIBAUD

BARRISTER-AT-LAW

MAURITIUS:

CENTRAL PRINTING ESTABLISHMENT, POUDRIÈRE STREET, No. 5.

1891

of control which exist in the several cases which the legislator included among contraventions—the circumstances under which these offences are committed rendering them far less dangerous to society.

Art. 40 of Ordinance 21 of 1851, which Ordinance constitutes a Municipal Corporation for the town of Port Louis and vicinity thereof, gives power to the Municipality to regulate a number of matters, including the suppression of gambling, which before found a penal sanction in the chapter of contraventions in Ordinance 36 of 1838. In virtue of this power, Regulation No. 80 was passed.

"Any person who shall establish or keep "any game of hasard or lottery in any public "road or place or in any house opened "to the public, whatever may be the nature "or description of these games shall be "liable to a fine not exceeding ten pounds "sterling."

Municipal regulation No. 80 when drafted to replace for the town of Port Louis par: 10 of Artiele 382, was so worded as to render the working of that paragrah more easy and the meaning of the Legislator more clear, but we are of opinion that neither in express terms nor by implication does it abrogate Article 335 of our Penal Code. Like paragraph 10 of Article 382 which it has replaced, this Municipal regulation was intended to work together with Article 335 of the Penal Code and not to supersede it, the Municipal regulation providing for specific cases of lesser gravity, and Article 335 of the Penal Code providing, as before, for those cases which were of a more serious nature.

In other words, Article 335 of the Penal Code declares that the fact of keeping or establishing a lottery is a misdemeanor, but when this fact takes place in a public place where of necessity the act is a temporary one, it is simply a contravention punishable by the Municipal Regulation No. 80 of 15th. March 1852.

The information in the Court below charges establishing and keeping a lottery in Fanfaron Street; it does not say that the offence took place in the street itself, or in a house open to the public. It does not disclose on the face of it any of the circumstances which would make the offence come within the Municipal Regulation, and therefore, as it stands, this information charges the general and more serious offence which is punished by Article 335, and it is perfectly valid.

We hold, therefore, that Article 335 of the Penal Code is still in force and that the judgment of the Magistrate which was founded on an implied repeal of that Article is wrong in law.

We, therefore, quash the judgments complained of and remit the case to the Magistrate for further procedure.

SUPREME COURT.

APPEAL FROM DECISION OF MASTER — FOLLE-ENCHÈRE — MINORITY RAISED ON APPEAL — ORDINANCE 19 OF 1868 ARTICTE 52 — LICITATION IS PARTITION AND NOT SALE — CLAUSE OF FOLLE-ENCHÈRE INSERTED — ARTICLE 883 —APPEAL DISMISSED.

1o. *The Court will not allow a point of minority to be raised for the first time on appeal from a decision of the Master on a petition praying for the nullity of proceedings in "folle enchère," there being a clear text regulating the procedure to be followed before the Master and enacting that applications incidental to seizures of immoveable properties shall disclose the grounds of such applications.* (*Ordinance 19 of 1868, Article 52*).

2o. *A licitation between co-heirs is a partition*

and not a sale, although strangers be allowed to bid, and in the absence of any express convention to the contrary, no right of folle-enchère exists against a co-licitant for non payment of his purc hase price.

3o. *In the present case, however, there was a special and express clause concerning the right of folle-enchère, and such a clause, inserted in the cahier des charges without any reservation in case one of the co-licitants should purchase, renders the adjudicatees, though co-licitants, liable to be sued in folle-enchère.*

4o. *The insertion of such a clause indicates the intention on the part of the colicitants to renounce the privilege of articles* 883 *of the Code Civil and to subject the purchaser, even if he be one of the co-licitants, to the resolutory action and to all its consequences.*

—

JOYDRUTH & ANOTHER, — Appellants

and

JAGDUTH THE WIFE,—Respondents

—

Before

His Honor A. MURE, — Acting Chief Judge.

His Honor J. ROUILLARD, — Puisne Judge.

and

His Honor L. V. DELAFAYE, — Acting Puisne Judge

—

Honble. W. NEWTON, and E. VAUDAGNE,— Counsels for Appellants.

V. MARJOLIN,—Attorney for the same

V. KERN,—Counsel for Respondents

A. de COMMARMOND,—Attorney for the same

—

Record No. 25035.

4th July 1890.

This is an appeal from a judgment of the Master dismissing a petition whereby the Appellants prayed for the nullity of certain proceedings in "folle enchère" instituted by Jagduth the wife against Ramdath Joydruth and Raindhower Joydruth, the appellants before this Court.

The history of the case is as follows :

In May 1884, certain immoveable properties depending from the succession of one Joydruth were being licitated between the heirs of the late Joydruth, before the Master's Court, and five of them were, on the 29th of May 1884, adjudicated to Ramdath Joydruth and Raindhower Joydruth, two of the co-licitants.

On the 28th of October 1889, the deed of partition and liquidation of the estate and succession of the late Joydruth was homologated by the Supreme Court. The sum of Rs. 1,526,21 was, under that deed, abandoned to Jagduth the wife, one of the heirs of Joydruth, out of the purchase price of the five properties bought by appellants who had not paid their price.

On the 30th. of Oetober 1889, the attorney of Joydruth the wife served, at her request a notice "commandement" upon Ramdath Joydruth and Raindowher Joydruth claiming from them payment of the aforesaid sum, and the sum due to his client not being at once paid, he immediately began proceedings in "folle enchère" against them.

On the 5th November 1889, Ramdath and Raindhower Joydruth presented to the Master a petition praying for the nullity of those proceedings upon several grounds set forth in the petition. On the 3rd. December, the Master, after having heard parties, gave judgment dismissing the petition with costs. It is that judgment which is now under review.

Most of the reasons of appeal were practically given up, with the exception of two, which were insisted upon by the counsel for the appellants.

It was first argued, that the respondents cannot lawfully exercise the right of "folle enchère" against Ramdath and Raindhower Joydruth because they, being co-licitants and having purchased upon a licitation, are supposed, by the fiction of Article 883 of the Civil Code, to have always been sole owners of the whole subject purchased by them, and that no resolutory right exists against a co-licitant for non payment of his purchase price, the licitation being a partition, not a sale.

It was further contended that, at all events the adjudication of the 24th. of May 1889 was null and void, in as much as Raindhower Joydruth, one of the adjudicatees, was a minor at the time of the purchase and was assisted by a dative guardian who had not obtained from the family Council authorization to buy or to consent to a clause of "folle enchère" against the purchaser even if he were a co-licitant.

That plea of minority is raised for the first time on appeal. The petition presented to the Master in conformity with Art. 52 of Ord. 19 of 1868 contains several grounds. None of them raises either expressly or impliedly the point of minority. The parties appeared before the Master on the day fixed for hearing the objections mentioned in the Petition, and neither in the written pleadings nor in the arguments of counsel, was that question of minority submitted to the Master's consideration.

Whatever may be said of the discretionary power of this court to allow points which have not been raised in the Courts below to be taken on appeal, we do not think that such discretionary power, if it exists, can be legally exercised, when, like in the present case, there is a clear text regulating the procedure to be followed and enacting that applications incidental to seizures of immoveable properties shall disclose the gronnds of such applications.

The Supreme Court has already had occasion to decide this question in a case where the position of the party raising the point was much stronger than that of the now appellants.

It was in a defence to a "contredit" where no procedure was required or traced out, and where the argument alone had been omitted. Yet, the judges laid down a broad rule in those terms: "the point was not taken before the Master and may not be taken here."

(Dubois-St. Alme the wife vs. Loumeau, Piston's Rep. 1866 pape 96.)

We think that in the present case the point of minority cannot competently be submitted to us on appeal.

With regard to the first point argued by the appellants, we are of opinion that a licitation between co-heirs is a partition and not a sale, although strangers be allowed to bid, and that, in the absence of any express convention to the contrary, no right of "folle enchère" exists against a co-licitant for non-payment of his purchase price.

But in the case which is now before us, the cahier des charges contained a special and express clause concerning the right of "folle enchère." Art. VIII enacts: In default by the purchaser or purchasers of fulfilling or justifying when so required, that he or they have fulfilled the several clauses and conditions incumbent upon him or them, it shall be proceeded against him or them, under the penalties provided by law, to the resale by way of "folle enchère" of the properties so awarded, without prejudice however to any other mode of execution, and in such case the purchaser or purchasers shall forfeit all sums which he or

they may have deposited or paid either on account of the purchase price or of the costs of sale.

The jurisprudence of the French Courts is very clearly settled on that question and the majority of the French authorities also lay it down that such a clause inserted in a "cahier des charges" of a licitation without any reservation in case one of the co-licitants should purchase, renders the adjudicatee, even if he be a co-licitant, liable to be sued in "folle enchère" in case he does not pay his purchase price.

We have been asked to consider clause VII as a mere formal clause "clause de style". In all ordinary sales, the insertion or omission of such a clause matters little, Article 733 of the Code of Civil procedure enacting that: "faute par l'adjudicataire d'executer les clauses de l'adjudication, l'immeuble sera vendu à la folle enchère."

But in a licitation, the insertion of such a clause as clause VII of the Cahier des charges, to our mind, indicates the intention on the part of the co-licitants to renounce the previlege of Article 883 of the Civil Code and to subject the purchaser, even if he be one of the colicitants, to the resolutory action and to all its consequences.

For these reasons, we are of opinion that the respondents, Jagduth and wife were exercising a legitimate right in sueing the "folle enchère" against the purchasers who had not paid their purchase price.

The appeal must therefore be, and the same is hereby dismissed with costs.

SUPREME COURT.

—

REVOCATION OF GUARDIANS OF ILLEGITIMATE CHILD — PROCEDURE — PRINCIPAL ACTION SUMMONS TO SHOW CAUSE — ARTS. 18 AND 79 OF THE RULES OF COURT — ORD: 4 OF 1871 ART. 6 — REVOCATION BY MASTER AND MAGISTRATES — COSTS.

When a guardian appointed by a family council seeks for the nullity of the appointment of another guardian by another family council, he should proceed by way of principal action and not by a summons to show cause—(Art: 18 of the General Rules of Court).

2o. *There is no analogy between such a demand and a "tierce opposition"—(Art. 79 of the said Rules),*

3o. *Art. 6 of Ord: 4 of 1871 under which a guardian who illtreats etc. his ward, may be revoked by the Master or the District Magistrate who appointed him, applies only to those guardians appointed by the Master of the Supreme Court or by District Magistrates without summoning a family council.*

4o. *The Court did not grant costs against a party who had followed an erroneous but established procedure.*

—

ARTHÉMIDOR,—Plaintiff.

and

COLLARD AND ORS.,—Defendants.

—

Before

His Honor JOHN ROUILLARD,—Puisne Judge.

and

His Honor E. DIDIER ST. AMAND,—Acting Puisne Judge.

E. KOENIG,—Counsel for the Plaintiff.
G. ROCHERY,—Attorney for the same.

J. JOLLIVET,—Counsel for the Defendants.
L. A. THIBAUD,—Ministère Public.

—

Record No. 25,199.

29th. July 1890.

The defendants appeared on the seventh July instant to show cause why the resolutions of a Family Council held, under the presidency of the Master of the Supreme Court on the sixteenth May last, by which A. Collard and J. Véronique were respectively appointed guardian and sub-guardian of the minors Marie Antoinette Walker and Marie Louise Adaken, the natural children of one Rangen Adaken alias Rangamah, should not be declared null and void. The facts which have given rise to the present proceedings, are shortly as follows :

At the death of Rangen Adaken, who died about the year 1880, one Alfred Boulanger and one Orphée Domingo were appointed (by a family Council) guardian and subguardian, respectively, of the two minor children above referred to.

Alfred Boulanger and Orphée Domingo having departed this life, several persons—styling themselves friends of the two minors, formed, on the 16th. May in the present year, a family Council under the presidency of the Master of the Supreme Court, and by virtue of a resolution of the family council aforesaid, A. Collard and J. Véronique, two of the Defendants, were appointed respectively guardian and sub-guardian of the minors aforesaid.

The resolutions of the family council were in due course referred to the Ministère Public who gave avorable conclusions and, subsequently, to one of the Judges of the Supreme Court by whom the resolutions were homologated on the twenty first May 1890.

On the 23rd May of this year other persons, also alleging themselves to be friends of the same minors, assembled before the Master of the Supreme Court and under the presidency of that officer, appointed as guardian and subguardian of the minors, the present plaintiff and one Emilien Sébille. The resolutions of the family council were submitted to the Miuistère Public, and on conclusions which were favorable, they were, on the 29th May 1890, homologated by a different Judge of the Supreme Court.

The reason why in so short an interval two different guardians and sub-guardians were appointed to the same minors, without the fact attracting attention, was, apparently that in the second family council one of the minors was designated under the name of Marie Antoinette Walker, the issue of the intimate connexions of the said widow Vyaboury Poullé with James Walker and acknowledged by them both, whilst in the minutes of the family council held on the 16th May last, the same minor is designated as Marie Antoinette, the issue of the late Rungen Adaben, deceased widow of the late Vyabouay Poullé and of father unknown". The Plaintiff avers that when he took part in the proceedings of the family Council held on the 23rd. May last, he was in utter ignorance that a family Council had been previously held and a guardian and subguardian already appointed.

The grounds for challenging the resolutions of the first family Council as we gather from an affidavit sworn to by the Plaintiff on the 30th. May, are 1o. that the Council was composed of persons entirely unknown to the minors and to the persons who live with the said minors ; 2o. that the resolutions of the aforesaid family Council are contrary to the wish expressed by the mother of the minors shortly before her death ; 3o. That the legal mort-

gage of the Minors was fixed by the family Council at a sum which does not properly represent the Estate accruing to the minors.

An objection was raised "in limine" to the form of the proceedings by which the plaintiff seeks to obtain the nullity of the resolutions of the family Council above referred to.

It was conten ded that the demand should have been, in conformity with Article 18 of the general Rules of Court, introduced by way of declaration, and that Rule 79 which enacts that "applications for validity of attachm ents, cancellations of Inscriptions of mortgage partition of property "requête civile," tierce opposition and other applications of simlar nature shall be made to the Court summarily by notice of summons" and by which the Plaintiffs had probably been guided when they framed their application, did not refer to cases like the present. The plaintiff's main argument was that he had followed in this matter a precedent of this Court, in the case of Smith vs. Procureur General (Reports 1883, page 115). It was further urged that the proceedings here partook of the nature of a "tierce opposition" which was one of the cases contemplated by Rule 79.

It is quite true that in Smith vs. Procureur General, which was a case in many points similar to the present one, the application took the shape of a notice with summons, but it is also to be remarked that in that case no objection to the procedure followed was raised. It can hardly be contended, therefore, that there was a definitive ruling of the Supreme Court on a point now raised for the first time. As to the second point urged by the Plaintiff, there is, in the opinion of the Court, no analogy between the present proceedings by which the plaintiff who is only, as he alleges, a friend of the minor, and who has not any possible reason for contending that he has been injured by the resolutions of a family council, asks that they should be held null and void, and a "tierce opposition" which is a special form of procedure by which a person who has not been made a party to certain proceedings is allowed to protect himself against a judgment "qui préjudicie à ses droits." On the other hand, we find that according to French jurisprudence, the decisions of family council except, of course, in those cases in which an appeal can be made, must be challenged by way of an "action principale en nullité" See Dalloz minorité §258. We must therefore come to the conclusion that the application to this Court has not been made in proper form.

This is also the opinion expressed by the Substitute Procureur General who favoured us with his conclusions, but he seemed to suggest a remedy provided for by Article 6 of Ordinance No. 4 of 1871 which, according to us, does not apply to the present case.

By article 6 of Ordinance 4 of 1871, intituled "an ordinance to make provision for the appointmont of guardians for illegitimate children in certain cases, it is enacted that upon any complaint brought before the Master of the Supreme Court etc. that an illegitimate child, to whom a guardian has been appointed *under Ordinance 4 of* 1871 is ill treated &c. &c., it shall be lawful for the Master &c., summarily to revoke the appointment of such guardian and to appoint another in his place." In spite of the general terms of the clause of the above article which at first sight would seem to apply to all guardians appointed under Ordinance 4 of 1871,—which ordinance provides both for the appointment of guardians to natural children by family councils in certain cases, and for their appointment by the Master of the Supreme Court or District Magistrates without the co-operation of family councils, in other cases, the Court holds that this clause applies only to the appointments of guardians which may be made by the Master of the

Supreme Court and by District Magistrates *without summoning a family Council.*

The meaning of the first part of Article 6 of Ordinance 4 of 1871 is made sufficiently clear by the last paragraph of the same Article which refers, as to the procedure to be followed, to Article 4 of Ordinance 4 of 1871, which is the Article providing for the cases in which the Master or the Magistrates have authority, without the assistance of a family Council, to appoint guardians.

These guardians, the Master can revoke in the same way as he appoints them.

By giving a different interpretation to Article 6, we should come to this singular result that whilst in certain cases under Ordinance 4 of 1871, a guardian cannot be appointed except with the assistance of a family Council, yet, if there are reasons for removing that very guardian, the Master or Magistrate acting alone shall have power, not only to revoke him, but, of his own authority, to appoint another guardian.

The Court cannot entertain this application in its present form, but, in as much as the plaintiff had reasonable grounds for following the same procedure as in the case of Smith, above cited, the Court will not give costs.

SUPREME COURT

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NOTARY—AGREEMENT WITH CREDITOR—MODE OF PAYMENT — PROFESSIONAL PRESTIGE AND INDEPENDANCE — DUTIES OF NOTARY.

A notary entered with a creditor into a written agreement, under which he made over for three years to that creditor one twelfth of his fees for all deeds drawn up for the clients of the office, the creditor undertaking, on his side, to have all his deeds of every kind drawn up by the said notary, during the same period.

Held by the Court :

1o. *That the deed should not be regarded as a deed of partnership, but simply as a mode of payment of a debt; but that that mode of payment was calculated to lead to misapprehension and was one which a professional man should endeavour to avoid.*

2o. *That, especially, the clause under which all the deeds of the creditor were to be drawn up by the notary was not one calculated to enhance the prestige of the profession and to ensure that perfect independence of action which is one of the principal conditions for the proper performance of the duties of a notary.*

Considering, however, that the debt was one originally due by the predecessor in office of the notary, the Court did not think that it was a case in which disciplinary measures should be taken.

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THE PROCUREUR GENERAL,—Plaintiff

and

A. JOLLIVET,—Defendant

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Before

His Honor A. MURE,—Acting Chief Judge.

His Honor J. ROUILLARD,—Puisne Judge.

and

His Honor E. DIDIER ST. AMAND,—Acting Puisne Judge.

—

L. A. THIBAUD, Acting Substitute Procureur General,—Appeared for Plaintiff.

J. GUIBERT, "Crown Attorney",—Attorney for the same.

Hble. G. GUIBERT,—Counsel for Defendant.

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Record No. 25,238.

1*st. August* 1890.

This is an application made by the Procureur General against the Respondent who is a Notary Public to show cause why disciplinary measures should not be taken against the latter or why he should not be otherwise dealt with as the Supreme Court might deem expedient.

It appears that on the death of the Respondent's father, Mr. Lewison had a claim against him, that that claim, the amount being doubtful, was compromised and the Respondent became liable to pay to Mr. Lewison the sum of Rs. 2,800.

The Respondent in applying to the then Procureur General for his appointment to the office of Notary in succession to his father, undertook to pay his father's debts and, among others, that of M. G. Lewison for the sum of Rs. 2,800. The Respondent not being able to pay these sums at once, entered into an agreement with Mr. Lewison which has given rise to the present difficulties and brought about the present proceedings.

The question is whether the agreement above referred to constitutes a partnership or is a mere mode of payment of a debt. There is a phrase used at the commencement of the deed which almost implies that Mr. Lewison was intended by it to have a share in the business of the Respondent's office, but that phrase does not form part of the contract between the parties and is merely introductory to the conventions made between them. By the first clause of the deed, the Respondent makes over and abandons one twelfth of the fees for deeds drawn up by him for his clients, under deduction of the usual cost of license, rent of office, salaries of clerks and costs of stationery. By the second clause, Lewison, on the other hand, undertook to give to the Respondent all his deeds of every kind to be drawn up by the Respondent. In the deed it is stated that the transaction is entered into in consideration of Rs. 2,800 which the Respondent admitted he had received, and the agreement was to endure for a period of three years at the termination of which the whole would be cancelled without any claim either on one side or on the other. There is a last clause by which Mr. Lewison was to receive Rs. 40 per month, shewing that the debt was one of such a nature, that interest had to be paid on it. This deed was made under private signatures, and was dated the 15th. September 1886, and the fact of its existence having recently come under the notice of the Procureur General, the present application has been made.

The Court has no doubt whatever that the deed ought not to be regarded as a deed of partnership, but was simply a mode of payment of a debt by giving a part of the profits, in place of making a present actual payment, which it appears the Respondent was not able to do. We have no doubt that the Respondent never meant to give to Mr. Lewison a right of inspection of the the deeds executed in his office, and that the utmost that Mr. Lewison could have demanded was an inspection of the receipts and disbursements of the office and perhaps of the abstract of each deed which the notary is bound to make and which contains merely the date, the nature and description of the deed and the names of the parties.

But, at the same time, we cannot but express our regret that the mode of payment adopted by the Respondent was calculated to lead to misapprehension and doubt of what he really meant to do. We think it a regrettable course to follow and one which a professional man desiring to maintain his perfect independence should always endeavour to avoid.

There is more serious objection to the second clause of the deed, under which Mr. Lewison became bound to bring all his own

business to the Respondent's office during the period of three years. It is to be feared that any professional man having such a client might be tempted to forget his duty to be impartial in performing the business in which such an obligant was concerned.

It is absolutely necessary that the action of a Public functionary should be perfectly free and that that freedom should not be overcome by the feeling that one of the parties before him could bring further business. We are glad to say that not a single specific case has occurred in which the dangers now hinted at have occurred, and that these dangers have not assumed more than a speculative form. It would be unfair to the Respondent not to take notice of the peculiar circumstances surrounding this case. Whilst a very young man he succeeded his father with a promise made by him to the Procureur General that he would pay the debts left by his father as a Notary Public. As he had no fortune of his own, he had to pay these debts out of the proceeds of his business and his agreement with Lewison was evidently made with the view of fulfilling this praiseworthy undertaking. Probably there was no other way of satisfying his creditor.

The Respondent will no doubt be the first to admit that an arrangement by which a professional man confers on a creditor a portion of his earning, and stipulates for an absolute right of doing that creditor's business during a certain period, is not calculated to enhance the prestige of his profession nor to ensure that perfect independence of action which is one of the principal conditions for the proper performance of the duties of the responsible profession to which the Respondent belongs And the fact that these proceedings have been adopted will bring what should be the true principle of conduct forcibly under his notice.

We think, however, that this case stands on special grounds and commends itself to our indulgence, and we are of opinion that we are not called upon to do more than give this expression of our views.

The rule sought for will simply lapse.

SUPREME COURT

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JURYMAN—WRONG DESCRIPTION OF CHRISTIAN NAME—ORDINANCE 29 OF 1883, ARTICLE 94—CAUSES OF CHALLENGE—OBJECTION OVERRULED.

After a juryman had been sworn, the accused took an objection that the juryman had been summoned under a christian name which was not his.

By the Court:

Under Article 94 of Ordinance 29 of 1853, no challenge can take place to the array or to any particular juryman, after the swearing of the jury, unless for some cause which arose after the administering of the oath.

It was for the accused, to whom the panel of the jury had been sent several days before the trial, to find out whether the juryman had been wrongly described or not.

It cannot be said here that the cause of challenge arose after the administering of the oath to the juryman.

Objection overruled.

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THE QUEEN

v.

E. DE BOUCHERVILLE

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Before

His Honor E. DIDIER ST. AMAND, — Acting Puisne Judge,—Presiding Judge

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L. A. THIBAUD,—Acting Substitute Procureur General, for the Crown

Hon. W. NEWTON,—Counsel for prisoner

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29th. September 1890.

The jury having been sworn, Mr. W. Newton Q. C., counsel for prisoner, objects to the jury as being improperly formed, one of the jurymen, Mr. Arthur Blackburn, as he is designated in the panel, stating that his real name is Jules Alphonse Blackburn.

The Court after hearing parties on the objection, delivers the following judgment :

The panel out of which Jurors are to be taken for the trial of the prisoner at the Bar contains the names of two gentlemen who have been to a certain extent wrongly described, the name of James Alphonse Blackburn and the name of James Arthur Blackburn. The one name was entered on the Jury list by the Mayor, I believe, and the other, by the District Magistrate of Pamplemousses. It is very much to be regretted that these gentlemen did not find time to go to the Mayor or to the District Magistrate of Pamplemousses to have the wrong designation which had been given to them amended. However, they may plead that they had so much business on hand, that they could not attend to such a little matter ; but, in reality, it is not a little matter, for we see the inconvenience that it has given rise to. But a thing that is more serious is that Mr. Jules Alphonse Blackburn should have come forward and have taken an oath under a name which he knew was not correctly given to him. I do not think he did it wilfully, but he certainly did it carelessly, for if he had stated at once that his name was wrongly given, the matter would have ended there ; whilst by going into the box under a wrong designation, to a certain extent, he has given rise to a lot of trouble which might have been avoided.

The Hon. Mr. Newton, Counsel for the accused, says this is the first time that this point has been taken and it is not denied by the Substitute Procureur General. The best proof that this is the first time is that no authority in point can be quoted as having taken place in Mauritius ; the two learned gentlemen have been unable in the few minutes I have given them to find any authority deciding the question ; therefore, the Court is to decide the point upon the several articles of the law that have been quoted. Article 94 of the criminal Procedure Ordinance, upon which the Substitute Procureur General relies, says : " No " person can of right challenge the array " or any particular juryman, after the swear- " ing of the Jury, unless for some cause which " arose after the administering of the oath." What took place in this case ? The panel was at the disposal of the accused, for the purpose of making enquiries as to the several names which were on the panel in order to be able to challenge those whom he thought could not give him a fair trial. The accused had a direct interest in enquiring into all the names that were on the panel. The Substitute Procureur General considered that the public officers who attended to the list had done their duty and that none of the jurors having complained the names were correctly given. They could not suppose for a moment that a juror would come forward and, his name being wrongly given, would take the oath. As to the identity of the Juror in this case, there is not the slightest doubt. Every person intended to be summoned has been summoned ; but in this case, however, Mr. Blackburn, I repeat, did not consider it fit to say that James was not his name and that Jules was, and therefore he has given the Court a lot of trouble. I consider the proper construction to be put on this fact, namely, the wrong description of one of the christian names of the Juror is that the cause of challenge did not arise after the administering of the oath,

but before. It was for the accused to find out whether the juryman had been wrongly described, and when this juryman did not think it worth his while to inform the Court that his name had been wrongly given, to challenge him at once or to state to the Court that there had been a mistake. It would be too easy, if a juror had it in his power to come forward and answer to a wrong name, to prevent the trial from taking place.—I do not consider the objection has been taken in time; I consider it is too late now to take it, and I shall order the formation of the Jury to continue.

SUPREME COURT.

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EXAMINATION ON FAITS ET ARTICLES—ERRONEOUS ORIGIN OF TITLE—CONCEALMENT OF TRUTH — BAD MEMORY — ORAL EVIDENCE REFUSED.

The fact that a party who was examined on "faits et articles" stated that he had forgotten that his title to the immoveable in question was an adjudication in a licitation before the Master, and that he attributed it to a notarial deed, was considered by the Court not as a proof of equivocation or concealment of truth, bnt merely of a bad memory or insufficient acquaintance with the facts.

Oral proof refused.

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ARÉKION,—Plaintiff.

and

HARTER, —Defendant.

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Before

His Honor A. MURE,—Acting Puisne Judge.

His Honor J. ROUILLARD, —Puisne Judge.

and

His Honor L. V. DELAFAYE,—Acting Puisne Judge.

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Hon.G. GUIBERT,Q.C.,—Counsel for Plaintiff.
H. BERTIN,—Attorney for the same.

Hon: W. NEWTON, Q. C., — Counsel for Defendant.

G. ROCHERY,—Attorney for the same.

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Record No. 24,824.

20*th. October* 1890.

The Court does not think it necessary to hear a reply on the part of the Defendant here. We have read the examination on "faits et articles" of Mr. Harter, and looking at the statements contained therein, we do not think that they amount at all to what is absolutely necessary to make out the case of the Plaintiff. Let it be remembered that it is an action brought by the Plaintiff upon the allegation that an estate was bought by the defendant for the Paintiff as his prête-nom and that, when the sum had been repaid to the defendant, the estate was to be made over to him. Now, that is a very important and a very serious matter, and let us consider in the first place the circumstances in which this case is raised. It is remarkable that in reference to a much smaller matter that took place between the parties (who are related to each other as Brothers-in-law) vizt. the purchase of a right to a small estate at Peter Both, which was not worth nearly the value of the Estate here in question, a contrelettre setting forth the facts is admitted to have been executed between the parties, and it does not appear natural to presume that when the parties regulated a trifling matter by a contrelettre, in this matter which was far more important, that very easy thing should not have been done and was not a part of the transaction between them. Then again, as part of the preliminary matters that we have to consider, it is very improbable that the Plaintiff Arekion should have remained such a long time without having some writing in proof of his claim. Neither

at the time of the purchase by Harter nor at the time when Harter sold the property to Pitot, does the Plaintiff, so far as we know, ask Harter to give him a contrelettre or to put in writing anything which will make out the allegations of the Plaintiff now. There is no correspondence to show that there was a written application made at all. Many years elapse and Harter buys another place as a residence for his family and for Arekion, before the latter ever thought of applying to Harter in this matter. For a long period of time, and in the midst of several family events which must have caused the question of right to be discussed, Arekion makes no claim. Those are important matters exterior so to speak to the examination on personal answers to which Harter has been subjected. Now, when we come to consider that examination and the facts that have been brought out in it we cannot at all admit that they make probable the Plaintiff's case; that the vraisemblance required by Article 1347 of the Civil Code is at all made out. In the first place, the allegation of Harter is quite plain and clear, that he bought the property for himself and not for Arekion; that he bought it for the purpose of giving to his own mother and to Arekion and to his own relations a residence to live in, but that his intention was always to buy the property for himself, and no inconsistency is brought out in this statement so as to let in the oral proof or to give us a substitute for that which the law requires, a "commencement de preuve par écrit." Various matters were referred to by Arékion's counsel, for instance: 1o. That Harter had forgotten that his title was an adjudication on a licitation before the Master and attributed it to one of the numerous notarial deeds between the parties. But this is proof not of equivocation or concealment of truth, but merely of a bad memory or insufficient acquaintance with the facts, for he stated among other things that he instructed his attorney to do all that was necessary, without troubling himself with the details of what was done. 2o. That the fees of the joint attorney employed at that time by the brothers-in-law were reduced to a small sum; and it is said 3o. that Harter's conduct was unlikely, that he should spend Rs. 12,000 in doing all these things. These are not contradictions or evasions, or replies full of obscurity,— which raise a suspicion of bad faith; nor is there any equevocation or anything which can be made the substitute for "the commencement de preuve par écrit".

There is a letter which is of very great importance written by Mrs. Harter to Arekion, when Harter himself was unwell. Some Indian had tried to sow discord between these brothers-in-law by asserting that certain language had been used by the one of the other; and what is the position which Arekion then took up? It comes out as part of the facts and circumstances resulting from that letter, that he had threatened to go away from the place. If the property had been his, he would certainly have then maintained his right to it and claimed that no one had a right to speak so that he would leave it. In this letter, however, a phrase occurs upon which the Plaintiff now founds, that is to say, that there is the expression used by the sister writing to himself, "you know very well that this property was bought for you and your children." That is explained by Harter quite sufficiently and satisfactorily in his examination, he says that the meaning of that letter of which he approved, was simply this; it was to provide a home residence for them, he being at the expense of doing so; but the important fact connected with that is one which is wholly against the claim of the Plaintiff; that he had offered to go away from the place on account of the supposed language of Harter. That is the strong fact in the letter and not the phrase quoted, which is not used by the Defendant but by his wife writing to her own brother. Therefore, the Court

cannot hold that any facts or circumstances have been proved which enable us to let in general proof that the party here stood in the relation of prête nom to the other. By the general law, that can only be proved by the writ of the party and nothing has been brought out here which entitles the Plaintiff to get the better of that law. The motion for parole proof is therefore refused.

Mr. Gulbert: I shall move for a non suit.

Plaintiff non suited with costs.

SUPREME COURT

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FORGERY — AUTHENTICATED AND PUBLIC WRITING — DISTRICT CASHIER — SAVINGS BANK — CASH BOOK — ARTICLE 107 PENAL CODE.

A forgery committed by a district cashier in the Savings Bank Cash Book, which the district cashier is bound to keep, is a forgery in an authenticated and public writing and is punishable under article 107 *of the Penal Code.*

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THE CROWN

and

EVARISTE DE BOUCHERVILLE

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Before

His Honor A. MURE,—Acting Chief Judge.

His Honor J. ROUILLARD,—Puisne Judge.

and

His Honor E. DIDIER ST. AMAND,— Acting Puisne Judge.

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L. A. THIBAUD,— Acting Substitute Procureur General, for the Crown.

Hon. W. NEWTON, Q. C., — Counsel for Prisoner.

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22*nd. October* 1890.

This is a reference on points of law raised at a trial at the Criminal Assizes, on the 2nd. October instant. The accused Evariste de Boucherville was found guilty by the Jury on the 4th., 5th. and 7th. counts of an information, in which he was charged with various crimes. The counts referred to were all founded upon the 107th. Article of the Penal Code and charged that the accused, a public officer and a functionary, did in drawing up an act in the discharge of his duties fraudulently alter the substance thereof by stating therein a false fact as true; the documents referred to being the account of the Savings Bank monies received and paid by him. This account of the Savings Bank monies was admitted by the accused's Counsel to be the Savings Bank Cash Book, which the accused as District Cashier was bound to be keep. At the trial, this entry occurs in the Minutes of Procedure. "The "verdict having been recorded, the Court "reserves for the decision of the full Bench "the following point of law taken by the "Counsel for the accused: namely, that the "offence of forgery, charged under Article "107 of the Penal Code in the 4th., 6th. "and 7th. counts of the Criminal informa- "tion, does not amount to the forgery con- "templated by the said Article, inasmuch as "the entries made by the accused in the "Cash Journal of the Branch Savings Bank "do not constitute public or authentic "writings, the public having no access to "the books of the Savings Bank."

The Article in question, No. 107 of our Penal Code, nowhere states explicitely that the writing must be public and authentic, but it merely sets forth "that any functionary "or public officer who in drawing up an act "in the discharge of his duty shall fraudulent- "ly alter the substance thereof by stating "any false fact as true shall be punished &c."

The Article, therefore, contains only the constituent parts of crime and altogether

ignores the mere words public or authentic. In truth, these words occur in the heading of the paragraph of the Penal Code, in which this Article is contained. The reason of this is apparent. The framers of the French Penal Code, of which ours may be said to be a copy, established various degrees of culpability in the crimes of forgery ; inflicting a heavier punishment upon a public officer who commits this kind of crime than on a private person. Accordingly, the heading is : " Des faux en écriture publique ou authen- " tique et de commerce ou de banque." The next paragraph contains those clauses of the Code which punish forgery of private writings. The nature of the writing is made under this code merely the test of the degree of punishment. So much is this the case, that in France it has happened that the case of an accused convicted of the forgery of a private writing before the Assizes has been appealed by the Procureur General to the Court of Cassation, who annulled the judgment of the lower Court that the writing was a private one, with its lower scale of punishment, and holding that the document was a public one, in the interest of justice remitted the case to the Assize Court to impose the heavier penalty (See the case of Boistot S. V. 1880-1-45). The crimes contemplated under the heading of these paragraphs are crimes of the same nature but are simply punished differently.

In discussing the questions raised, the Court must assume that the facts are correctly set forth on each count, and must be assumed to be true, and then it will have to consider whether the crime set forth in the 107th. Article has or has not been committed.

The first objection urged against the conviction of the Jury is that the document was not a public document because the public were not entitled to have access to it. It is true that the word " public " is frequently used in the sense of something open to the public as for instance a " place publique ". But this is not the only meaning of the word, it also includes that in which the public are interested, or what is of a general nature in opposition to that which is private. The Ministère Public or the Public Prosecutor is the person who attends to the crimes of the community, and is so called not for the mere reason that every body has access to him but because he prosecutes crimes openly and is " custos morum." In like manner " chose publique " means the commonwealth or that abstract aggregate of the public life of a community which is involved in the idea of that word. In short, the word " public " must be construed in reference to the idea with which it is connected and not on the narrow basis argued by the accused's counsel.

In the present case, we have a Cash Book containing an account of the Saving's Bank monies received and paid by the accused, and it is contended that that is not a public document. But Article first of Ord: 10 of 1865, the Savings' Bank Ordinance, orders that the Savings' Bank established at Port Louis under the denomination of the " Mauritius Government Savings' Bank " shall continue to receive monies in deposit under the guarantee of Government. The Savings' Bank of this Colony is, therefore, a Government institution. The Government is itself the debtor of the depositor, and 'employés' appointed by th e Government carry on its business; a gain, by the regulations made in virtue of the powers in the Ordinance, it is directed that the Branch Savings' Bank in the rural Districts shall be under the charge of the District Cashiers, who, again, are placed under the control of the Receiver General, and the books and accounts are directed to be kept according to the form prescribed by him. There is no doubt then that this crime was committed by a District Cashier, who is a public functionary, in a

book belonging to the Government and by which the Government may be bound in certain circumstances even to third parties. As this book, which is kept under the special regulations, records Government transactions, we have no doubt whatever that it ought to be styled a public Cash Book and in no sense is entitled to be called a private writing. There can be no doubt that in each of these three accounts the act or entries which were made by the accused were made in public documents.

This title to the paragraphs undoubtedly sets forth the words " public or authentic " as an alternate requisite of the acts referred to in the separate clauses. But it is true that in discussing these crimes the commentators and many decisions speak of the two qualities together and unite the two words by the copulative conjunction "and" The French writers and Courts were naturally led into this course because, by Article 1317 of the Civil Code, it is enacted that every entry made by a Public Officer having the right to make such a entry is an authentic act. The words public and authentic are with them almost synonymous. In general, the one act cannot be done without the other. While, therefore, it may not be necessary to go into the objection that the document was not authentic, it is yet right to say that that word must be construed with reference to the subject mat er. Much of the argument on this part of the case turned upon the authenticity of the " Livret " or depositors Pass Book compared with the Cashier's Cash Book.

But it is clear that the two things concern different parties. The depositors' Pass Book is a document which certify the right of a third party dealing with the Savings Bank. But the Cash Book is a document which the Government directs its functionary, the Cashier, to keep in order that a proper record of the latter's transactions may be preserved. It is a document between Master and Servant, but it is also kept for the benefit of the depositors in certain circumstances. The Government Regulations require two Books, one kept by the District Cashier and another by the District Clerk in order to control each other; and by means of both to authenticate the transactions of the Cashier with the Public by which the Government is to be bound. If the entry here in question had been true and set forth a true state of facts, the entry of the accused Cashier would have proved to his Master, the Government, that seven hundred rupees had been on a certain date paid te Suckonee and therefore it would have been authentic, but that entry being a false entry, it is a forgery in what otherwise would have been an authentic writing. It is also clear that this book is kept for the benefit of depositors in certain circumstances and should have the character of authenticity attached to it, because the entries made in it may bind the Government in the event of the lost of the " Livret " or Pass Book. If the " Livret " be lost, the public and the Government will necessarily refer to this Book, controlled by the District Clerk's Book, in order to ascertain their respective rights. We think then that the word " authentic " must be construed with reference to the subject matter which is dealt with, and that as a public functionary keeps this book and makes the entries therein, they ought to be considered authentic.

Holding these views, the Court consider that the verdict of the jury must stand and that in law no good objection has been stated thereto.

SUPREME COURT

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APPEAL FROM CONSULAR COURT MADAGASCAR—ORDER IN COUNCIL OF 1869 — COMPETENCY OF APPEAL—MATTER AT ISSUE—DISPUTE OR DIFFERENCE—EXAMINATION ON FACTS BEFORE JUDGMENT—STAT: 32 AND 33 VICT: CAP: 6 — ORDER IN COUNCIL OF APRIL 1831 — ORDINANCE 16 of 1869.

The appellants obtained judgment against respondents for $ 2909 before the British Consular Court at Madagascar and, subsequently, summoned respondent to be examined as to his ability to pay the judgment debt.

The Consul refused to allow the judgment creditor to examine the judgment debtor upon facts antecedent to the decree obtained against him, and dismissed the summons.

The judgment creditor having appealed, it was urged, as a preliminary point, that there was here, "no sum or matter at "issue whatever, either greater or less than "200 dollars." (Clause 6 of Order in Council of 4th. February 1869, Published by Government Notice No. 171 of 1869, P. 532.)

By the Court: on the preliminary point:

1o. *Under above Clause 6 of the Order in Council, every possible dispute or difference, as well, as suits of all kinds, is to heard and determined by the Consul subject to an appeal.*

2o. *The present question is certainly a dispute or difference, though it may not be a suit.*

3o. *Clause 6 of the Order in Council is quite different in its general conception from the clauses in the Order in Council of 13 April 1831, regulating appeals to the Privy Council from the Supreme Court of Mauritius.*

4o. *The words at the end of the Clause 6 cannot and ought not to be limited to those cases in which a mere pecuniary sum is concluded for.*

5o. *Sections 6 and 8 of the Order in Council of 1869 have not been repealed by Statute 32 and 33 Vict: Cap. 6, which is applicable to England only, nor affected by Ordinance 16 of 1869, which was subsequently framed.*

The preliminary objection was overruled.

Held, on the merits, that the questions touching the property of the judgment debtor antecedent to the judgment were perfectly competent.

Judgment recalled with costs.

—

LAROQUE & Co.,—Appellants.

and

O. D'UNIENVILLE, — Respondents.

—

Before

His Honor ANDREW MUBE,—Puisne Judge.

and

His Honor E. DIDIER ST. AMAND,—Puisne Judge.

—

Honble. W. NEWTON, Q. C., — Counsel for Appellants.

W. LE BLANC,—Attorney for the same.

O. LAURENT, — Counsel for Respondents

L. DE ST. PERN, — Attorney for the same.

—

Record No. 959.

10*th. November* 1890.

In this appeal from the Consular Court of Madagascar the facts are that the appellant got judgment against the Respondent, on the 25th. June 1890, for the sum of two

SUPREME COURT OF MAURITIUS

His Honor Sir E. J. LECLÉZIO, Chief Judge.

His Honor A. MURE, Puisne Judge.

His Honor FRÉDÉRIC CONDÉ WILLIAMS, Puisne Judge.

His Honor JOHN ROUILLARD, Puisne Judge.

The Honorable LIONEL COX, Procureur and Advocate General.

L. A. THIBAUD, Acting Substitute Procureur General.

E. DIDIER ST. AMAND, Master.
C. D'EMMEREZ DE CHARMOY, Esq., Registrar.

L. ISNARD, Chief Clerk and Assistant Taxing Officer.

VICE-ADMIRALTY COURT

His Honor Sir E. J. LECLÉZIO, Chief Justice, Judge.

The Honorable A. MURE, Judge Surrogate.

The Honoroble LIONEL COX, Queen's Advocate.

G. RITTER, Registrar.

J. J. BROWN, Marshall.

J. GUIBERT, Queen's Proctor.

COURT OF BANKRUPTCY

JUDGE :—THE MASTER OF THE SUPREME COURT.

GEO. NEWTON, Accountant in Bankruptcy.

H. B. DOWSON, Registrar of the Court of Bankruptcy.

COUNSEL (actually practising)

Leclézio, E.	1828	Lionnet, E.	1870	Kœnig, E.	1884
Bazire, E.	1858	Desenne, O.	1871	Noël, M.	1885
Martin Moncamp, P. G.,	1861	I. Jollivet	1873	Serret, E.	1887
Delafaye, V.	1864	Mathews, F.	1876	Herchenroder,	1888
Chastellier, P. L.	1864	Hewetson, H.	1876	Leclézio, L	1888
Guibert, G.	1864	Hugues, A.	1877	Vaudagne, E	1888
Newton, W.	1864	Colin, R.	1878		
Depoigneur, I.	1864	K/Vern, V.	1880		
Galéa, H.	1867	Laurent, O.	1883		
Beaugeard, P.	1868	Jenkins, D.	1884		

ATTORNIES (actually practising)

Lalandelle, G.	1842	Halais, J.	1865	Ducasse, V.	1879
Hewetson, W.	1846	Sauzier, E.	1866	Leclézio, H.	1880
Laurent, E.	1846	Commarmond, A.	1867	Edwards, W. H.	1881
Mercier, J.	1848	Rousset. C.	1870	Colin, E.	1882
Colin, A. J.	1851	Wohrnitz, L.	1870	Huteau, E.	1882
Guibert, J.	1853	Rolando, A.	1871	Leblanc, M.	1884
Finniss, W.	1853	St. Pern, L. de	1871	Marjolin, V.	1884
Duvivier, Ed.	1854	Ganachaud, E.	1871	Chaperon, D. O.	1885
Chazal, P. E. de	1860	Lastelle, F.	1872	Bernard	1887
Victor F.	1861	Leblanc, W.	1872	Piarroux, S.	1887
Mallet, F.	1861	Arnal, C.	1873	Robert, F. (junior)	1887
Ducray, V. G.	1861	Kœnig, G.	1874		
Sicard, N.	1862	Bouloux, G.	1876		
Simonet, F.	1863	Thatcher, H.	1876		
Pitot, A	1863	L'hoste, A.	1877		
Bétuel, V.	1863	Leblanc, E.	1877		
Boullé, A.	1863	Herchenroder, G.	1877		
Ritter, G. A.	1864	Lafitte, L.	1878		
Rohan, A.	1864	Chaillet, E.	1878		

DECISIONS

OF THE

SUPREME COURT, VICE-ADMIRALTY COURT

AND

BANKRUPTCY COURT

OF

MAURITIUS

1890

PART IV

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EDITED BY

ARTHUR THIBAUD

BARRISTER-AT-LAW

MAURITIUS:

CENTRAL PRINTING ESTABLISHMENT, POUDRIÈRE STREET, No. 5.

1891

thousand nine hundred and nine dollars and forty seven cents ($ 2,909.47 ¢). On the first of July following, the appellants applied for a summons calling upon the Respondent to appear before the Consular Court to be examined as to his ability to make payments of the aforesaid principal sum with interest and costs. This procedure was applied for under the Rules and Regulations framed on the 1st. July 1869, under Her Majesty's Order in Council of the 4th. of February 1869, by the Consul for Madagascar (Government Notices 1869 P. 575.) By the second form attached to which rules, it is prescribed that the copy of the judgment shall be in a certain form therein given, and under it, the Defendant is ordered to pay to the plaintiff a certain sum on or before a certain date; and it is added "if you neglect to obey this order, you will be liable to have a writ of execution issued against your goods, under which they may be seized and sold, and you will further be liable to be summoned by the Court to be examined as to your ability to make the payment ordered under the decree, and to be imprisoned in case of your not answering satisfactorily." The summons under this procedure having been obtained, on the 5th. of July the respondent was examined and cross-examined to considerable length as to his ability to make payment of the sum in question. In the midst of his examination, the appellants' attorney moved "to examine the judgment debtor upon facts antecedent to the decree obtained against him by the Plaintiff and to call witnesses on these facts."

Me. Laurent objects.

"The Court rules that the judgment "debtor can only be examined as to his "ability to make the payment ordered under "the decree of the Court and upon facts "subsequent to that decree and also the "witnesses interested to be called."

"Me. Giraudeau in presence of the ruling "of the Court does not call witnesses and "moves for imprisonment in terms of the "summons."

Me. Laurent states that no proof having been made against the Defendant the summons should be dismissed.

Judgment of the Court: Summons dismissed.

The applicants having brought this appeal, a preliminary objection was taken thereto by the Respondent's counsel, who argued that an appeal was only allowed when the sum or matter at issue is of the amount or value of two hundred dollars or upwards; and that here there was no sum or matter at issue, either greater or less than the sum now mentioned. The sixth. clause of the Order in Council (Government Notices 1869. P. 532) is to the effect "that all suits, "disputes, differences and cases of litigation "of a civil nature arising between British "subjects within the dominions of the "Queen of Madagascar, shall be heard and "determined by Her Majesty's Consul who "shall be the sole judge and arbiter thereof, "respectively; subject, nevertheless, to an "appeal against the decision of the Consul "therein to the Supreme Court of Mauritius "in cases where the sum or matter at issue "is of the amount or value of two hundred "dollars or upwards."

In the construction of this clause of the Order in Council, it is to be observed that every possible dispute or difference, as well as suits of all kinds, is to be heard and determined by the Consul, *subject to an appeal*. The present question was certainly a dispute or difference, though it may not be a suit. It was a dispute about the execution of the decree given about five days before. It is not in the least of the nature of an unsatisfied judgment, on a decree perhaps taken years before, as in the case of Cassim Mamoojee versus Goolam Hossen

(1885 P. 23). But it is a part of the execution of the original judgment and the form given in the Rules and Regulations makes it to be so. We consider that this clause of the Order in Council for Madagascar is quite different in its general conception from the clause in the Order in the Council of 13th. April 1831, regulating appeals to the Privy Council from this Court, though there are a few words in both to the same effect.

The clause itself is perfectly general and it would be very unfortunate if litigants were obliged to proceed by way of writ of certiorari, and not by appeal. It is clear that whatever the litigation might be, appeal was allowed if the amount exceeded two hundred hundred dollars. The words at the end of the clause quoted cannot and ought not to be limited to those cases in which a mere pecuniary sum is concluded for, and it is apparent that that was not intended, because the words sum or matter at isssue are used as an alternative, and the words amount or value are also used as an alternative,so that we are driven to the conclusion that there was no intention to limit the right of appeal to a pecuniary sum. If an estate, an animal, like a horse, or goods in regard to which no price appears in the proceedings, be the matter at issue and be of a value greater than two hundred dollars, we are of opinion that an appeal will lie, it being made clear to the satisfaction of the Court that the valuc is greater than the sum below which no appeal is to be brought. In the present case the matter in dispute is very much larger and the procedure was had in an effort to make good decree for that large sum. There being no doubt what that sum is, we are of opinion that an appeal in regard to the question now raised in competent.

Nor can we entertain the idea that Section 8 of the Madagascar Order in Council has been repealed by an Imperial Statute 32 and 33 Victoria, Chapter 62, changing the mode in which imprisonment for debt was to be enforced, which statute was also passed in 1869, subsequently to the date of the Order in Council. That statute was a procedure statute applicable to England and operating there only, and we cannot hold that it repealed Section 8th of the Order in Council for Madagascar. It is admitted to be valid in every other respect. It is in virtue of its provisions that the Supreme Court of Mauritius entertain appeals from the Consular Court of Madagascar or have original jurisdiction in case arising there. It is in virtue of the same Order that an extensive criminal jurisdiction is vested in the Consul, and also in the Supreme Court of Mauritius. It would require a very serious proof of intention on the part either of the Queen in Council or the Imperial Legislature of Great Britain to repeal that Order in Council or any part thereof. We are clearly of opinion that Clause 8th of the Order in Council is still in force.

It may be a question whether and how the Order in Council for Madagascar which is dated 4th. February 1869, with the relative rules and regulations which are dated 1st. July 1869, are affected by an Ordinance of the Mauritian Legislature, No. 16 of 1869, which is dated 15th. October 1869. It is quite clear that the words at the termination of the 8th Clause of the Order in Council which direct that the Consul may enforce his decision by distress and sale or imprisonment in like manner as a decision of the Supreme Court of Mauritius in a civil suit is enforced within the same " cannot have been framed with reference to the provisions of the Ordinance No. 16 of 1869, which was not in existence at the time the other documents were written. These words were probably inserted in the Order in Council because the Supreme Court of Mauritius has in virtue of the said Order a concurrent jurisdiction with the Consul in regard to all suits of a civil nature between

British subjects in Madagascar ; and it was necessary that the decrees of both Courts should be executed in the same way."

In the present instance, the Consular Court followed the procedure which is sketched out in the Rules and Regulations made by the Consul in virtue of the powers conferred on him by the Order in Council. It is unnecessary to say more than that procedure seems well founded, and that no valid objection to it can be taken.

It remains to notice the question on the merits of this appeal. The Consular Judge refused to allow the judgment debtor to be examined as to any fact except those subsequent to the decree and the same rule was ordered to be applied to the witnesses intended to be called. Without entering on the authority of the judgment in the case of Paris vs. Ramsamy, Reports 1883 P. 38, and without comparing it with that of Marie 1885 P. 128, we think it quite clear that questions might have been put to the respondent in reference to facts which had occurred before the decree, and that the witnesses to be examined might have spoken to similar facts. In no case in Mauritius, even in the case of unsatisfied judgments, has that course been forbidden to be followed. In this case, in which the procedure was brought a few days after the judgment and as a part of the decree itself, it could never be contemplated by the Order in Council coupled with the Rules and Regulations of the Consul, that the inquiry was to be limited in the way in which the judge has held it to be. We think that questions touching his property antecedent to the judgment must be and are perfectly competent.

We therefore recall the judgment complained of, with costs.

SUPREME COURT

—

DEED OF SALE — DIFFERENT CLAUSES—INTERPRETATION— CLAUSE OF SALE— DESCRIPTIVE CLAUSE.

The question was whether a vendor had sold only her rights as heiress of her father in a plot of ground, or all her rights whatsoever, including those she held as heiress of a sister.

On behalf of the plaintiff, it was urged that, in a part of the deed, mention was made that the rights she was selling accrued to her through her father.

By the Court :

1o. *There is no doubt omission and indefiniteness in the part alluded to of the deed of sale.*

2o. *But in the clause of sale of the deed, the vendor stated that she was selling all her undivided rights whatsoever, amounting to about seven acres and three perches.*

3o. *Seven acres and three perches represent exactly her share as heiress both of her father and sister.*

4o. *The clause of sale is, besides, the chief and operative clause of a deed, the one which expresses the act and will of the vendor, and is the test and measure of the extent and nature of the rights sold.*

5o. *An omission or indefinitness in a descriptive clause, which is inserted merely to inform the purchaser of the previous history of the land, cannot control or limit the right given by the clause of sale.*

DESFOSSES,—Plaintiff.

and

BHURUTH AND OTHERS,—Defendants

—

Before

His Honor Sir E. J. Lechézio, Kt.,—Chief Judge

and

His Honor A. Mure,—Puisne Judge.

—

E. Vaudagne, —Counsel for Plaintiff.
F. Victor,—Attorney for the same.

Hble. W. Newton, Q.C.,—Counsel for the Defendants.

P. D. Chaperon, — Attorney for the same.

—

Record No. 25,110.

19*th. November* 1890.

In this action, the Plaintiff seeks a decree annulling a judgment of adjudication of a plot of ground of twenty two acres and a half in extent in the District of Savanne at the place called " Chemin Grenier " made on the 17th. October 1889 (2) condemning defendant to reimburse to the plaintiff certain sums disbursed by him and (3) to pay the plaintiff a sum of damages. The leading allegation upon which these conclusions are based is this ; that " after a careful perusal of the Cahier des Charges of the said sale and of the notarial deed of transfer by Lelong the wife to Bhuruth and Jangoor, and after inquiries about the lawful heirs of the late Jean Théodore and those of his deceased children, the plaintiff has been able to ascertain that all the parties having a right of ownership in the said plot of ground, have not been made parties to the said Cahier des Charges of the said sale and have in consequence not sold their shares in the said plot of ground of the plaintiff.—The original sole owner of the plot of ground in question was one Jean Théodore, in whose person it was a "propre". On his death the property became divided between his four daughters, as co-owners, two of whom were called Mrs. Lelong and Mrs.Lebrasse. The latter died, and her one fourth devolved for one fourth upon her mother Irma Collard and for three fourths to her three sisters. Mrs. Lelong was therefore owner of one fourth and of one sixteenth or of ten thirty second parts of this plot of ground. She sold to Bhuruth all her ostensible rights in the plot of ground. Bhuruth subsequently became plaintiff in a licitation of the plot, to which he called all the parties apparently interested in the property, but he did not call two minor children of Mrs. Lelong who, by this time, had died.

The sole question which the plaintiff urged before the Court was that Mrs. Lelong had not, sufficiently and without doubt, sold to Bhuruth the share of that plot of ground amounting to two thirty second parts, to which she had right as one of the heirs of her sister Mrs. Lebrasse. The Defendants in reply maintained that the minors Lelong had no right or interest whatever in the property and that it was not necessary to call them as parties to the licitation.

The notarial deed of sale under which this question arises is of date 14th and 15th June 1889, and was executed by Mrs. Lelong in favour of Bhuruth for an agreed on price. The rights which she then sold are thus described. " Tous ses droits indivis générale-
" ment quelconques s'élèvant à environ sept
" arpents et trois perches qu'elle a et peut
" avoir dans un terrain de la contenance de
" yingt deux arpents et demi environ, sis
" au district de Savane, dit Chemin Grenier,
" et borné comme suit, etc. "

Mr. Lelong's whole rights in this plot of ground of twenty-two acres and a half being ten thirty second parts, she makes

over all her rights generally whatsoever which she has or may have in the undivided land.—She makes no exception or reservation, and the words undoubtedly extend to and cover every right she had or might have in that land. But to make matters clear, though her right extended to a portion of every grain of the undivided twenty-two acres and a half, she says what she has sold amounts to about seven acres and three perches, as if that amount of land had been sold by her in severalty. But seven acres three perches and one eighth is just ten thirty seconds of twenty two acres and a half, whereas if she had sold only that share to which she had right as heir of her father, the description would have been five acres and sixty two perches and a half. Moreover the word " about " is prefixed to both the larger and the smaller extents of ground. There is no doubt Mrs. Lelong intended to sell her whole rights and did not reserve any part thereof.

But the plaintiff maintained that in the subsequent part of the deed, where the granter comes to describe how the subject sold came into her possession, there is a reference only to the succession of her father Mr. Jean Theodore, and that that showed that only the share coming from him was sold. In this part of the deed of sale there is a reference also to a deed of notoriety executed both on the same day, in which the death of Mrs. Lebrasse is set forth as having occurred on 16th. March 1880. As the whole state of the family is set forth in that deed of notoriety, it is quite apparent to any one reading both deeds that Mrs Lelong must have had in her person in 1889 her share of Mrs. Lebrasse's succession. But there is certainly an omission or indefiniteness in this part of the deed of sale, and the question is whether that limits the extent of the subject sold to the quantity of land to which Mrs. Lelong succeeded on the death of her father. It is true also that the Cahier des Charges is not very satisfactorily framed and various omissions occur in it.

But, on the whole matter, we are of opinion that the clause of sale is itself the leading clause of the deed and expresses the act and will of the maker of the deed and is the test and measure of the extent and nature of the right which the seller gives and the purchaser acquires. In determining the extent of land, which has been sold, that clause prevails over all others. The purchaser's right being determined by it, if it be clear and certain, descriptions or words that are apparently inconsistent or indefinite or ambiguous in other clauses must give way to it. In particular, an omission or indefiniteness in a descriptive clause, which is inserted merely to inform the purchaser of the previous history of the land, cannot control or limit the right which is given by the chief and operative clause of the deed.

We dismiss this action, with costs.

SUPREME COURT.

OBLIGATION—WANT OF CONSIDERATION—ONUS PROBANDI — AVEU INDIVISIBLE — INCONSISTENCIES IN PLEA—COSTS.

In an action for a decree declaring null and void a bill of exchange and a notarial obligation subscribed by plaintiff in favour of defendant, for want of consideration, it was admitted by the defendant that the consideration mentioned in the bill and obligation was not the true consideration.

It was, thereupon, urged that it was for the defendant to lead evidence in order to prove the existence of the consideration alleged by him in his plea to have been the true consideration, his pleas being inconsistent.

By the Court:

1o. *If the defendant had not made the above admission in his plea, there is no doubt*

that the plaintiff would have been in the necessity of proving his allegation of absence of consideration.

2o. *If there are inconsistencies in the various pleas put forth by the defendant, they are only apparent inconsistencies.*

3o. *Those pleas constitute an "aveu" on the part of the defendant which the Court consider as "indivisible"*

4o. *The plaintiff must establish his allegations that the obligations were subscribed by him without any cause whatsoever.*

Costs of the day against plaintiff.

—

COO-VYTHILINGUM,—Plaintiff.

and

SOOPRAYEN,—Defendant.

—

Before

His Honor Sir E. J. Leclézio, Kt.,—Chief Judge.

His Honor J. Rouillard,—Puisne Judge.

and

His Honor E. Didier St. Amand, — Puisne Judge.

—

H. Galéa,—Counsel for Plaintiff.
E. Laurent,—Attorney for the same.

Hon: W. Newton, & G. Guibert, Q. C., — Counsel for Defendant.

H. Bertin,—Attorney for the same.

—

Record No. 24,324.

21*st. November* 1890.

This action is to the effect of obtaining from the Court a decree declaring null and void a bill of exchange of Rs. 10,000 subscribed by the Plaintiff on behalf of the defendant on the 11th June 1887 and a notarial obligation for Rs. 20,000, also subscribed by the Plaintiff in favor of the defendant, on the same day. The consideration in the notarial obligation is as follows :— "Pour prêt de pareille somme que lui a fait "le Sieur N. Sooprayen en bonnes espèces, "ayant cours de monnaie en cette île, comp-"tées et délivrées hors la vue du notaire "soussigné"—and the consideration in the bill was : "value received in cash". It is alleged in the declaration that those statements are not correct, and that the notarial obligation as well as the bill was subscribed without cause and obtained by fraudulent manœuvres. The fourth plea of the defendant, as it originally stood, runs as follows :— "and the said defendant avers that, on or "about the beginning of June last, the "plaintiff, being anxious to make a compo-"sition with his creditors and to obtain the "annullation of the adjudication of Bank-"ruptcy made against him on the 25th of "April last year, did subscribe on behalf of "defendant the aforesaid bill of exchange "and deed of obligation in the declaration "mentioned in consideration of the guaran-"tee in solido given by the firm V. Sooprayen "& Co. (of which the Defendant is the "managing member) to the creditors of the "said plaintiff for the payment and execu-"tion of the said composition ; and the said "defendant further avers that the said V. "Sooprayen did, on the 11th June last "year, sign and execute a private deed in "which they did bind themselves to "the payment and execution in solido of the "said composition ; and the said defendant "further avers that subsequently the said "private deed was converted into a formal "deed of composition between the said "defendant, V. Sooprayen & Co. the Plain-"tiff and the creditors of this latter, which "deed was eventually approved by a judg-"ment of the Court of Bankruptcy on the "22nd. July last, when the adjudication of

" bankruptcy against the plaintiff was an-
" nulled in consequence. And the said defen-
" dant further avers that, under the said
" deed of composition approved by the
" Court of Bankruptcy as aforesaid, he
" has been appointed trustee of the said
" composition with full power to recover
" and realise all the estate and property,
" both in Mauritius and in India, of the
" said plaintiff, which said estate and pro-
" perty are now vested in the said defendant
" under the aforesaid deed and judgment of
" the Court of Bankruptcy. And lastly, the
" defendant avers that he has executed and
" carried throughout the aforesaid deed of
" composition and judgment, so far as the
" said defendant and V. Sooprayen & Co.
" are concerned."

There has been an addition made to this plea, by an amendment which runs as follows :— " and the said defendant further
" avers that, at the time the formal deed of
" composition, dated 22nd. July 1887, above
" mentioned, was executed by the Plaintiff
" and approved by the Court of Bankruptcy
" on the same day, it was understood that
" although by the said deed and judgment
" of the Court of Bankruptcy all the plain-
" tiff's estate and property, both in Mauritius
" and in India, were unconditionally assigned
" to the defendant, as managing member
" of V. Souprayen & Co. and as trustee under
" the said judgment, the aforesaid bill of
" exchange and notarial deed would remain
" in due force and effect until the defen-
" dant was actually put in possession of the
" plaintiff's estate and property in India.
" And the said judgment avers that he is
" ready and willing to give a full and com-
" plete discharge to the plaintiff of the said
" bill of exchange and notarial deed in the
" declaration mentioned, provided the afore-
" said assignment be carried out and the
" aforesaid estate and property in India be
" handed over to him. And the said de-
" fendant avers that he has not as yet been
" able to obtain possession of the said estate
" and property and that the plaintiff is
" resisting strenuously in India the de-
" fendant's application to obtain such pos-
" session, on the ground, among others,
" that the assignment made by him as
" aforesaid is null and illegal. And the
" said defendant further avers that, so long
" as he has not obtained such possession,
" he is entitled to keep the said bill of ex-
" change and notarial deed, in order to
" enable him to reach the property in India."

From what preceeds, there is no doubt that the cause which is inserted in those documents, viz : the bill of exchange and the notarial deed, is not the true consideration of the obligations. The plaintiff therefore says that it is for the defendant who has alleged in his pleas that the consideration is different, from what was stated in the bill and in the notarial deed, to prove his allegation, and that it is no longer for him, the Plaintiff, to prove that the obligations are without cause. The Court understood during the argument that the allegation about fraudulent manœuvres was no longer insisted upon, so that the only question which is at present before the Court is whether it is for the defendant to lead evidence, that is to say to prove the allegations contained in the plea, or whether it is for the plaintiff to begin with the proof of the allegations contained in his declaration, that is to say, that the obligations are without cause. It was not denied by the Plaintiff's counsel that the " aveu " could not be divided in certain cases, for instance in cases such as those quoted under Art. 1356 Note 30 of Gilbert, in which it was held :—
" lorsqu'une partie reconnait que la cause
" exprimée dans un contrat n'est pas vérita-
" ble, mais en même temps assure qu'il y a
" une autre cause licite de l'obligation, cet
" aveu est indivisible, et le contrat ne peut
" être annulé comme étant sans cause ou
" sur une cause fausse."—

But it was contended for the Plaintiff that

the pleas as amended did not constitute an "aveu indivisible" because there was a certain inconsistency in the pleas themselves, and especially when they were read with the proceedings before the Court of Bankruptcy and before this Court as a Court of Appeal; it was argued that before the Bankruptcy Court the defendant alleged,—and his pretention was admitted by the Bankruptcy Court and confirmed by this Court on Appeal,—that he was completely vested in the ownership of the property both here and in India; whereas in the fourth plea, and specially before its amendment, it was stated that the consideration was a guarantee given in solido,—and, on account of those alleged inconsistencies, it was contended that the admission or "aveu" could no longer be considered as indivisible, and, as a consequence that it was for the defendant to prove his allegations and not for the plaintiff to prove the averment in his declaration that the obligations were without cause.

We have examined with care those pleas and also the collateral documents which were mentioned in the course of the argument, and we have come to the conclusion that, if there are inconsistencies in the pleas, they are merely apparent, and that in reality those pleas constitute an admission on the part of the defendant which the Court should consider as indivisible; if such admissions had not been made by the defendant there is no doubt that the Plaintiff would have been in the necessity of proving his allegation. We see no real contradictions between the admissions made by the defendant in his plea and his attitude before the Court of Bankruptcy which might entitle the Court to divide the defendant's "aveu"; although the fourth plea, such as it stood at first, might have been more clearly worded, the "aveu" appears to be made *bona fide*; besides, the amendment explains very well the position taken by the defendant in the first instance, and we see that he does not intend at all to avail himself of the bill of exchange and the notarial deed, as constituting a separate property of his own, but that they are merely collateral securities of the obligation taken by the defendant in the composition deed, and that he only wishes to keep them until he can obtain possession of the property in India, which according to the composition deed, approved by the Court of Bankruptcy and by this Court, was vested in him at the time of the composition.

We must therefore come to the conclusion that the "aveu" of the defendant being indivisible, it is for the plaintiff to prove his allegation that those obligations were subscribed by him without any cause whatsoever.

We also think that, as this incident occupied a certain time before the Court and was fully argued on both sides, the party who has failed must pay the costs of the day.

SUPREME COURT

SALE OF IMMOVEABLE PROPERTY — ACTION IN RESCISION — PLEA OF RATIFICATION — UNSOUNDNESS OF MIND—LESION—NOTICE NOT AMOUNTING TO RATIFICATION — PLEA OVERRULED—COSTS.

The plaintiff asked for the cancellation of a sale of an immoveable property made by his late mother on two grounds:

1o. *The vendor was of unsound mind at the time.*

2o. *Lesion of more than seven twelfths.*

The defendant pleaded ratification, the plaintiff having by a notice upon defendant required the production of a certificate from the Master that defendant's author had fulfilled all the clauses and conditions of the adjudication made to her of the property in question, and threatening a resale by

folle-enchère in case of non-compliance with the said notice. (*Article* 1338 *paragraph* 2 *Code Civil.*)

By the Court :

1o. *If the vendor was of unsound mind, such a notice would not be a sufficiently valid exception to an action based upon want of consent on account of the state of the mind of the vendor.*

2o. *The notice does not show in a categorical and certain manner that the Plaintiff was aware, at the time he caused it to be served, of the existence of the lesion.*

Case : 1854 : *Dalloz P.* 1854, *P.* 31.

Plea of ratification rejected with costs.

—

ROMAGOU, — Plaintiff.

and

GOBIN, — Defendant.

—

Before

His Honor Sir E. J. Leclézio, Kt.,— Chief Judge.

and

His Honor E. Didier St Amand,—Acting Puisne Judge.

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H. Galea,—Counsel for Plaintiff.
E. Pitchen,—Attorney for the same.

J. Jollivet,—Counsel for Defendant.
L. de St Pern,—Attorney for the same.

—

Record No. 24940.

21*st. November* 1890.

In this case, the plaintiff seeks to obtain the annullment of a deed of sale which was made by his mother, the late widow Romagou, to the Defendant of a certain plot of ground, and the action is founded upon the allegation that the late widow Romagou was of unsound mind at the time that the sale was made, and, besides, that there was a lesion of more than seven-twelfths, the price being much inferior to the true value of the land. The tenth plea of the Defendant runs as follows : " That even admitting, which is most formally denied that the late widow Romagou was of unsound mind and that the sale was made for a price much below the real value of the said portion of land, defendant says that Plaintiff has, long before the present action, waived his right, if even he had any, of praying for the nullity of the said sale for the said causes, by acknowledging through his acts the validity of the sale made to plaintiff, as aforesaid. "

In virtue of this tenth plea, the defendant has argued that there has been a ratification of the deed of sale made by the widow Romagou or, at all events, a voluntary execution of that deed of sale and has tendered in evidence a notice which was served upon Gobin by the Plaintiff in the present case, which notice runs as follows :— " You are hereby required and summoned within a delay of 48 hours from the service of the present notice upon you to justify to the undersigned attorney, by the production of a certificate emanating from the Master of the above Court, that the late widow Romagou had fulfilled all the clauses and conditions of the adjudication made to her of the two properties by her sold to you which were adjudicated to her in consequence of a sale by licitation which took place before the said Master of the Supreme Court in February 1866. And take further notice that if after the expiration of the delay mentioned in the present notice, you do not justify the said fulfilment of clauses, the said heirs Romagou shall apply to the said Master for the certificate of the fact and sue the resale of the said properties by way of Folle enchère

of the said properties. Under all reservations."

It is stated that by serving such a notice upon the person who had purchased the land, there was an acknowledgment of the validity of the sale made to him by Widow Romagon. To this, it is answered that such a notice, in the first place, was not equivalent to what is called a ratification in our law. There is no doubt that it does not come within the meaning and the text of the first part of article 1338, which runs as follows : " L'acte de confirmation ou ratification d'une " obligation n'est valable que l'orsqu'on y " trouve la substance de cette obligation, la " mention du motif de l'action en rescision, " et l'intention de reparer le vice sur lequel " cette action est fondée."

But the defendants stated that, at all events, it came within the second part of the article, which says " A défaut d'acte de confirmation " ou ratification, il suffit que l'obligation soit " executée volontairement après l'époque à " laquelle l'obligation pouvait être valable- " ment confirmée ou ratifiée. La confirma- " tion, ratification, ou execution volontaire " dans les formes et à l'époque determinées " par la loi, emporte la renonciation aux " moyens et exceptions que l'on pouvait " opposer contre cet acte, sans préjudice " néanmoins du droit des tiers."

Now, here, there are two grounds in the declaration. One of the grounds is that widow Romagon was of unsound mind. If the plaintiff is able to prove that the vendor was of unsound mind at the time of the sale, there could have been no consent given, and I do not think that a notice such as the one served upon the defendant could be a sufficiently valid exception to an action based upon want of consent on account of the state of mind of the vendor. But, besides this, the action is based also upon lesion of more than seven-twelfths of the value of the land.

There is also no doubt, in my mind, that such an act as the one which is before the Court is not sufficient to show in a categorical and certain manner that the Plaintiff was aware of the lesion at the time that the act was served. I find in Dalloz, year 1854, at page 31, a decision of the Court of Cassation which explains in a very lucid manner what is the law on that point. The rubric runs as follows : " La ratification par exécution vo- " lontaire n'existe à l'effet de rendre non " recevable l'action en rescision d'une vente " pour cause de lésion qu'autant qu'il est " certain que, lors de cette exécution, le " vendeur connaissait le vice de la lésion. " Ainsi, il ne suffit pas pour établir l'existen- " ce de la ratification que le juge constate " que le vendeur dans un intervalle de vingt " et un mois, écoulé entre la vente et son " décès, ne s'est jamais plaint de la lésion, " qu'il a, au contraire, fait élever sur le ter- " rain vendu, des constructions dont il avait " accepté la charge, qu'il a fait commande- " ment à son acheteur de payer une portion " exigible du prix "—that was a very strong argument against the vendor.— " qu'il a " même reçu une somme non comprise " dans la stipulation du prix ; qu'enfin " ces faits divers d'exécution n'étaient pas " d'une date assez rapprochée de l'époque du " contrat pour que le temps ait manqué au " vendeur de découvrir la lésion. De telles " circonstance ne constituent qu'une con- " naissance conjecturale de la lésion, qui ne " saurait équivaloir à la connaissance cer- " taine exigée par la loi. " There is a very good note at the foot of the page which says : " La lésion qui ne vicie que certains " contrats entache ces contrats d'une cause " de nullité que les actes d'exécution volon- " taires dont ils ont pu être suivis font " difficilement disparaître. Ainsi en ma- " tière de partage, quand l'Article 892 dé- " clare que la partage ne peut plus être " attaqué pour dol ou violence par le co-par- " tageant qui a aliéné son lot après la dé- " couverte du dol ou de la cessation de la " violence, il est généralement décidé que

" l'aliénation n'élève une fin de non re-
" cevoir contre l'action en rescision
" pour cause de lésion qu'autant qu'elle
" est accompagnée de circonstances dé-
" montrant, de la part du lésé, la volon-
" té bien certaine de purger le vice de
" la lésion, conformément à l'article 1338.
" En matière de vente on ne doit pas se
" montrer moins rigoureux dans l'apprécia-
" tion des caractères constitutifs de la rati-
" fication, et le pouvoir réservé à la Cour
" Suprême de controler cette appréciation
" permet de maintenir l'observation de la
" règle qui doit servir de guide aux juges du
" fait."

After reading these very judicious observations, I think that the Court would not be entitled to say that there has been a waiver of rights here, such as a ratification or voluntary execution, in presence of the sole document which is before the Court.

We must therefore reject the 10th plea and, as there has been a full argument upon it, we reject it with costs.

SUPREME COURT

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CERTIORARI—BEGINNING OF PROOF IN WRITING — QUESTIONS OF LAW AND FACT — JURISPRUDENCE OF SUPREME COURT.

1o. *In matters of certiorari, the Supreme Court will decline to examine other than legal questions, such as defects apparent on the face of the Record itself.*

2o. *The question of knowing whether a document contains the essential conditions for forming a beginning of proof in writing is a legal question which may be brought for review before the Supreme Court by certiorari*

3o. *But the point whether the contents of the document render likely or the reverse the "fait allégué" is a question of fact—left to be decided by the Magistrates on the merits.*

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THE HONORABLE
THE PROCUREUR GENERAL,—Plaintiff

and

THE ACTING JUNIOR DISTRICT MAGISTRATE OF PORT LOUIS AND DAMAIN,—Defendants.

—

Before

His Honor J. ROUILLARD,—Puisne Judge.

and

His Honor E. DIDIER ST. AMAND,—Puisne Judge.

—

The Hon. L. Rouillard, Substitute Procureur General,—Appeared for Plaintiff.

J. GUIBERT, "Crown Attorney,"—Attorney for the same.

YVES JOLLIVET,— Counsel for Defendants.

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Record No. 25,323.

21*st. November* 1890.

The defendant Damain was prosecuted before the Senior District Magistrate of Port Louis for having embezzled a pair of gold earrings "set with a diamond each," according to the description given in the information, which had been entrusted to the Defendant Damain for the purpose of being offered for sale to a gentleman in the Colony.

At the trial of the case, objection was made to oral evidence being led for the purpose of proving the alleged delivery, by widow Galas to Defendant, of the earrings, and the purpose for which they had been entrusted to Defendant.

The objection was founded on the rule laid down by a recent decision of the Supreme Court in re Robert, S. C. Reports page 76 1885, to the effect that the mode of proving contracts should be the same in Criminal as in Civil cases, and, whereas in a Civil action, the proof of the delivery of the earrings to Defendant could not have been made by witnesses, it was argued that in the criminal prosecution against the Defendant, the same transaction could not be proved by oral evidence.

This view of the law was accepted by the learned counsel who appeared for the Crown, but he submitted that there was in this case "a commencement de preuve par écrit" and he produced a document, emanating from Defendant, the text of which is as follows :—

" Je reconnais avoir vendu à Mr. L. Frap-
" pier une paire de dormeuses en or montée
" en diamants pour la somme de Rs. 400. que
" je reconnais avoir reçue comptant."

It will be remarked that the document sets forth the sale of a pair of "dormeuses," not to the gentleman to whom the earrings, according to Mrs. Galas, were to have been submitted for inspection, but to a different person.

The learned Magistrate held that the document produced could not serve as a beginning of proof in writing to show that Mrs. Galas entrusted a pair of gold earrings to accused for sale, *as it does not render likely the fact alleged.*

Oral evidence having been thus rejected, and there being no documentary evidence of the alleged transaction between the parties, the case was dismissed.

A writ of certiorari was subsequently obtained from this Court on the ground that the Magistrate ought to have admitted oral evidence, in as much as there was in this case a beginning of proof in writing emanating from the accused, and *rendering likely the allegation in the plaint mentioned.*

After hearing parties the Court has come to the conclusion that the rule, ordering the issue of the writ of certiorari in this case, must be discharged.

The principles by which this Court has been guided in matters of Certiorari have been fully laid down in the case of Capeyron and Delange vs Ally and anor (1878—1881) when it was held inter alia, that, in matters of Certiorari, the Court would decline to examine other than legal questions, such as defects apparent on the face of the record itself.

The question in this case is whether any defect is apparent on the face of the record.

Here, the error which the Magistrate is alleged to have committed is simply in the fact that he held that a document shown to him did not raise a sufficient presumption that a certain transaction had taken place between two parties, whilst, in the opinion of the public prosecutor, the Magistrate ought to have found that a strong presumption could be drawn from that document.

The Court does not consider itself called upon to decide whether the Magistrate was right or wrong in holding, as he did, that there was no sufficient presumption ; but if he erred, it was not in ruling against the law, but in his appreciation of a mere fact, namely, whether, the document above mentioned had sufficient connexion with the charge laid in the information.

It is obvious that in matters such as these, a magistrate must be allowed a certain amount of discretionary power and it will not be sufficient, in order to obtain the reversal of a judgment to show that the impression made on the mind of the Magistrate by the perusal of a certain document should have been different from that which was subsequently evinced by his judgment.

It has been repeatedly held by the Court of Cassation that whilst the question of

knowing whether a document contains the essential conditions for forming a beginning of proof in writing is a legal question which may be brought for review before the Court of Cassation, the point whether the contents of the document render likely, or the reverse the "fait allégué" is a question of fact left absolutely to be decided by the ordinary judges on the merits.

Here, the District Magistrate having merely exercised his discretion as to a question of fact, his judgment cannot be brought for review before this Court by way of Certiorari.

Rule discharged.

SUPREME COURT

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FAITS ET ARTICLES—INTERROGATORY OF THE GUARDIAN—RASH ANSWERS—POWER OF THE COURT.

1o. *As a rule, what a guardian may state in an interrogatory on "faits et articles" concerning the rights which minor children may have in real property cannot be binding upon the said minors.*

2o. *But the guardian may be interrogated on "faits et articles" touching facts which have come to his knowledge through his situation as guardian, such, for instance, as the existence of a "contrelettre" found among the papers of the succession.*

3o. *The minors are protected against rash or inconsiderate admissions of the guardian by the power vested in the Judges of appreciating the legal effects of the answers made.*

WIDOW BIJOUX & OTHERS,—Plaintiffs.

and

CABOCHE AND WIFE,—Defendants.

—

Before

His Honor Sir E. J. LECLÉZIO, KT.,—Chief Judge.

and

His Honor ANDREW MURE,—Puisne Judge.

—

Honorable W. NEWTON, Q. C.,—Counsel for Plaintiffs.

W. H. EDWARDS,—Attorney for the same.

H. GALÉA,—Counsel for Defendants.
E. CHAILLET,—Attorney for the same.

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Record No. 24,961.

5th. December 1890.

The declaration in this case recites that according to a deed under private signatures dated 6th. April 1870, duly registered and transcribed, the late Maxi Toinette, also called Maxi Bijoux, sold to the late François Olivier Manuel for and in consideration of an alleged sum of 1600 dollars, the half belonging to him, Maxi Bijoux, in four immoveable properties situate in Port Louis, and it is alleged that this sale was an apparent and simulated sale which was only made for the purpose of aiding Maxi Bijoux in his affairs, and that it had been agreed between Manuel and Bijoux that, after the settlement of the affairs of this latter, Manuel should pass back the properties to him or to his widow and children; it is further alleged that, in execution of this agreement, Manuel had sold to widow Bijoux, ever since the year 1878, the rights purchased by him, but that the sale could not be regularized through circumstances indepen-

dant of the will of parties; that afterwards, by a deed under private signatures dated 18th April 1879, widow Manuel, now Mrs. Caboche, in her own name and as legal guardian of her minor children issued from her marriage with Manuel, declared and acknowledged that the rights sold to her husband by Maxi Bijoux are the exclusive property of the widow and children of Bijoux; that these properties have always remained in indivision between the widow and heirs Bijoux for one half and one Miss Dorliska Bijoux, co-owner for the other half, and the rents divided every month between them; and the Plaintiffs, who are the widow and heirs of Maxi Bijoux, ask the Court to decree that the half of the properties sold by the late Bijoux to Manuel in 1870 belongs to them.

In their pleas, the defendants maintain that Mrs. Caboche and the minors Manuel are the lawful owners of the half of the immoveable properties sold to the late Manuel by Bijoux; that the deed of the 18th April 1879, signed by Widow Manuel, is null and void and is not binding upon her or upon the minors in any way, and that such deed was signed by her, Widow Manuel, under false pretences and fraudulent manœuvers employed towards her.

The motion now before us is that the Plaintiffs' counsel be allowed to examine the Defendant, Widow Manuel, now Mrs. Caboche, on personal answers, (faits et articles.) This is objected to on the ground that, in so far as she is personally concerned, the deed of the 18th. April 1879 is binding upon her and therefore it is useless to examine her in Court, but that any declaration she might make in Court in favour of the Plaintiffs would not be more binding upon her minor children than the deed itself in which she has admitted that the sale made in 1870 was a simulated sale.—As a rule, what a guardian may state concerning the rights which minor children may have in real property cannot be binding upon them; the reason given by commentators is that the guardian being unable to dispose of real property of which minors are the apparent owners, he cannot bind them by his personal answers, if examined as to facts relative to their rights to such property; that such facts are not relative to his administration as a guardian, in which he is allowed to act, *proprio motu*, under his personal responsibility.

We are disposed to sustain the argument of the Defendant's Counsel to a great extent; but the theory should not, in our opinion, be carried too far, and we agree with Dalloz, when he says in § 13 Verb: Interrogatoire sur faits et articles:—

"Ainsi, nous pensons que toutes les fois "que le lecteur sera interrogé sur des faits "que sa position de tuteur lui aura révélés, "par exemple sur l'existence d'une contre-"lettre trouvée dans les papiers de la suc-"cession, il pourra subir l'interrogatoire."— We think that the absolute exclusion of the guardian's examination in cases similar to the one mentioned by Dalloz, would be against the true spirit of the principle invoked in favour of the minors. For instance, in the course of the argument, it was stated that there existed receipts among the papers left by the late Manuel showing that he paid rent to the Bijoux family for one of the houses sold to him by the late Bijoux and which he occupied after the sale; we have no doubt that the guardian may be examined as to the existence of such documents among papers of the succession; and we think, that questions of a similar nature may also be put to her, if found relevant by the judges, who will appreciate the legal effect of the answers made. In note 16 to page 388 of Vol. 6 of the 3rd Edition of Zachariae, by Aubry and Rau, we read the following observation which we consider to be a very reasonable one: "Il serait injuste qu'un "plaideur fut privé de la faculté de faire "interpeller son adversaire en justice, en

" raison de la circonstance que ce dernier se " trouverait être un mineur. D'ailleurs, " les intérêts du mineur se trouveront suffi- " samment protégés contre les aveux incon- " sidérés que pourrait faire son tuteur, par " le pouvoir d'appréciation laissé aux tribu- " naux, etc."

Costs of this incident to be costs in the cause.

SUPREME COURT

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ORDINANCE 24 OF 1882, ARTICLE 43—COMMISSION — RETROSPECTIVE EFFECT—CONSTRUCTION.

Article 43 of Ordinance 24 of 1882, which enacts that there shall be payable to Government, in respect of all property taken possession of by the Curator, a commission of five per cent etc. applies to property already in possession of the Curator at the time of the passing of the law, as well as to property which afterwards came into such possession.

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VAUX THE WIFE AND OTHERS,— Plaintiffs.

and

THE MAURITIUS GOVERNMENT,*— Defendant.

—

Before

His Honor E. DIDIER ST. AMAND,—Puisne Judge.

and

His Honor V. DELAFAYE,—Puisne Judge.

—

H. GALÉA,—Counsel for Plaintiffs.
V. DUCRAY, — Attorney for the same.

L. A. THIBAUD, — Acting Substitute Procureur General—Counsel for Defendant.
J. GUIBERT, — Attorney for the same.

—

August 1890.

The Plaintiffs applied for an Order divesting the Curator of Vacant Estates of a sum of about eleven hundred Rupees, which he was retaining as commission due to Government on certain moneys belonging to a succession which had become vacant some twenty years before Ordinance 24 of 1882 was passed.

Galéa, for Plaintiff: Government claims here 5 o|o for the first year and 1 o|o for every subsequent year during which the money remained in the hands of the Curator of Vacant Estates. They do so under Art. 43 of Ord. 24 of 1882. When the Curator became vested with the money, Ord. 24 of 1882 had not been passed. That Ordinance clearly applies to all properties which was to become vested in the Curator, after its promulgation. But it cannot have a retrospective effect.

Thibaud, for Government: When Ord. 24 of 1882 became law, the Curator was actually in possession of the various sums belonging to the Estate. He has, besides, continued up to now to have them in his charge. Art. 43 of the Ordinance does not say that the commission will be payable to Government in respect of property which the Curator will hereafter take possession of, but in respect of property *taken possession* of by the Curator. This applies to property already in the possession of the Curator at the time of the framing of the Law, as well as to properties which would subsequenty become vested in him.

The Court took the same view of the law as defendant and refused the Order with costs.

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* This case is reported from notes taken in Court.

SUPREME COURT

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JOINT MANDAT— MANAGEMENT— SOLIDARITÉ.

When several parties receive a joint general and collective mandate to manage a concern, they are liable "in solido," jointly and severally, for the said management.

—

CHANTOCK,—Plaintiff.

and

PEZZANI AND OTHERS, — Defendants.

—

Before

His Honor A. MUER,—Puisne Judge.

and

His Honor J. ROUILLARD,—Puisne Judge.

—

Honorable G. GUIBERT, Q. C.,—Counsel for Plaintiff.

A. LHOSTE, — Attorney for the same.

Hon: W. NEWTON, Q. C., E. SAUZIER, and H. GALÉA,—Counsel for Defendants.

E. SAUZIER,—Attorney for the same.

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Record No. 24,998.

8*th. December* 1890.

Some time during the month of January 1888, an agreement or "accord" was made between the distillers of the Colony, having for its object the sale for exportation of rum manufactured in the Colony.

According to the agreement, rum for exportation was to be sold at a uniform rate of twelve cents per litre, out of which ten cents were to be paid to the manufacturer of the rum and two cents of a rupee were to be kept back to form a reserve fund.

The object of the reserve fund was, according to the evidence, to assist the distillers who might be in difficulties and, in a general way, to prevent the agreement or "accord" from falling through.

It seems also that, as to the mode of disposing of this reserve fund, the managers of the accord had the most extensive powers.

In pursuance of the above scheme, two distilleries "Alma" and "Jamaica", the owners of which impeded the working of the "accord", were purchased by the managers with money proceeding from the reserve fund. It is alleged also that shares of the Central Rum Warehouse were also purchased to prevent interference in the "accord". That "accord" ceased to be in force at the end of February 1889.

The plaintiff in the present action now asks that the Defendants should render him an account of their management; he further claims that, for any sum which may hereafter be found due by the Defendants, they should be declared jointly and severally liable.

The Defendants Pezzani and Jules Martin caused to be served on plaintiff, at the same time as their pleas, separate accounts of their respective management of the "accord".

As for the third defendant, Bax, he maintains that he has no account to give, because, as he alleges, he never had in his hands funds belonging to the "caisse de réserve" or any funds belonging to the accord.

The Defendants further deny that they are jointly and severally liable for the management of the accord and with respect to any sums of money which may be found due by any one of them.

This leads the Court at once to examine the position of the Defendants relative to the above agreement or "accord."